



















REPORTS OF CASES  
DECIDED IN THE  
COURT OF APPEAL,

ON APPEAL FROM THE SUPERIOR AND COUNTY  
COURTS—APPEALS IN INSOLVENCY—  
AND ELECTION CASES,

BY  
J. STEWART TUPPER,  
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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CHRISTOPHER ROBINSON, Q.C.,  
EDITOR.

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VOL. I.

CONTAINING THE CASES DETERMINED  
FROM THE 15TH SEPTEMBER, 1876, TO THE 27TH JUNE, 1877,  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND A DIGEST OF THE PRINCIPAL MATTERS.

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1878.

# REPORTS OF CASES

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## COURT OF APPEAL

OF THE SUPREME COURT OF THE PROVINCE OF ONTARIO  
AND THE COURT OF COMMON PLEAS

## COURT OF APPEAL

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ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

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J U D G E S  
OF THE  
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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# REPORTS OF CASES

## IN THE

# COURT OF APPEAL.

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McINTYRE V. MCCRAKEN.

RVR. 1 SCR 479.

*Public company under 27 & 28 Vic. ch. 23—Shareholders' liability.*

Certain shares in a company incorporated by letters patent issued under 27-28 Vic. ch. 23, were allotted by resolution of the directors among themselves at 40 per cent. discount, their then supposed value, and scrip issued for them as fully paid up. G acquired shares under this arrangement, which he assigned to the defendant for value, representing them as being fully paid up. Defendant enquired of the secretary of the company, who also informed him that they were fully paid up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up on the transfer book and other books, but the true state of the case could have been ascertained by reference to the ledger and journal.

*Held*, reversing the judgment of the Court of Queen's Bench, that defendant was liable to a creditor of the company for the amount unpaid upon the shares.

*Held*, also, that the action of the directors in issuing the shares at less than their nominal value was *ultra vires*.

Appeal from the judgment of the Court of Queen's Bench, discharging a rule *nisi* to set aside a verdict entered for the defendant, reported in 37 U. C. R. 422. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The case was argued on the 19th June, 1876. (*a*.)

The following were the appellant's reasons of appeal:—

1. That the defendant as a shareholder, the whole amount of whose stock has not been fully paid up, is individually liable to the plaintiff as a creditor of the company to the amount remaining unpaid on his stock.

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(*a*) *Present*.—DRAPER, C. J. A., BURTON, PATTERSON, MOSS, JJ. A.

2. That the defendant knew or ought to have known, that the shares held or purchased by him, were shares for which the company had not received the full amount fixed by the statute under which the company was incorporated.

3. That although as between the company and the defendant, the company cannot compel the defendant to pay what remains unpaid in respect of the shares held by him, yet the defendant is liable to a creditor of the company to an amount equal to that not paid up thereon, because it is the policy of the statute that a creditor of the company should not suffer by any contract entered into between the company and its shareholders: *Oakes v. Turquand*, L. R. 2 H. L. 325; *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29; *Re Hoylake R. W. Co. ex parte Littledale*, L. R. 9 Chy. 257, 260, 262.

4. That a creditor of the company is not affected by any fraudulent representations made by the directors or officers of the company to its shareholders, or those who become shareholders on the faith of such representations: *Henderson v. The Royal British Bank*, 7 E. & B. 356; *Daniel v. The Royal British Bank*, 1 H. & N. 681; *Powis v. Harding*, 1 C. B. N. S. 533; *Howard v. Shaw*, 9 Ir. L. R. 335; *The Deposit and General Life Assurance Co. v. Ayscough*, 6 E. & B. 761; *The Western Bank of Scotland v. Addie*, 1 Sc. Ap. 145.

5. That there is nothing in the statute of 1864, or the letters patent issued thereunder, which relieves the company or its individual shareholders from the liabilities imposed on an ordinary partnership or the individual members thereof.

6. The following authorities will also be referred to: *Lindley on Partnership*, — pp. 206, 556, 562, 565. *Re Electric Telegraph Co. of Ireland*, 2 DeG. F. & J. 275, 295; *Wood's Claim and Brown's Claim*, 9 W. R. 366.

The respondent's reasons against the appeal were :

1. The evidence at the trial establishes the truth of the sixth plea, and upon the facts set forth in such plea the plaintiff is not entitled to recover against the defendant in this action.

2. It having been established at the trial that the defendant did not have notice that the said shares had not been fully paid up, that he agreed to purchase the same as fully paid up shares and not otherwise, that he accepted the same as fully paid up shares and not otherwise, and became the holder of shares that had been fully paid up ; and only such shares, the defendant cannot be said to be and is not the holder of shares which are not fully paid up, and the plaintiff's remedy, if any, is not against the defendant, who never assumed any liability in respect of shares upon which anything remained unpaid.

3. The defendant made all the enquiry he was bound to make before he purchased and accepted the said shares. He was entitled to rely upon the statements of the accredited agent of the company in answer to enquiries made of such agent by the defendant before he accepted such shares. He had no right to inspect the books of the company before he accepted the said shares, and the defendant after making such enquiry did not know, and had no means of knowing, that the said shares were shares which had not been fully paid up.

4. The plaintiff has no greater rights against the defendant under the circumstances than the company has. The following authorities are relied on by the respondent in support of the foregoing reasons : *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29. *Spargo's Case*, L. R. 8 Chy. 407 ; *Coate's Case*, L. R. 17 Eq. 169.

5. The Lieutenant-Governor of Ontario in council had no power to issue the charter to the said company, and the said charter was void, the same being for purposes and powers within the authority, power, and control of the Governor-General of the Dominion of Canada in council : *B. N. A. Act*, sec 91, sub-sec. 10 ; sec. 92, sub-secs. 10, 11.

*Snelling*, with him *Wardrop*, for the appellant. The evidence clearly shews that a purchaser could not take what were contended to be fully paid up shares at a lower rate than the fully paid up value, and so defraud the creditors

of the company, and that the issue of such shares was *ultra vires*. The finding on the sixth plea is incorrect, as the company's books shew that the shares were issued at 60 cents on the \$. This case is distinguishable from *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29, as in that case the creditor was enforcing his rights through an official liquidator. The plaintiff could not have execution against two shareholders as the holders of the same shares, and as the statute confers the right of action only as against a shareholder, the plaintiff's cause of action is only against the defendant, as the transferee and purchaser of the shares in the declaration mentioned. The allegations stated in the sixth plea might possibly be the foundation of some application or right of special action or suit, in respect of any loss which the defendant might sustain by the fraud (if any) of Griffith, or through a breach of trust, but it could not affect the statutory right of the plaintiff as a judgment creditor of the company, to have execution against the defendant as a shareholder in respect of the shares transferred by Griffith to him; for Griffith by such transfer ceased to be a shareholder in the company. The allegation, if false, that the shares when assigned were fully paid up, does not make such shares remain the shares of Griffith, who transferred them, or cease to be the shares of the defendant to whom they were transferred; and he took them *cum onere*. As to the fourth reason of appeal, the company ought, but the creditor could not, be bound by the misrepresentations of the company or its officers, and a shareholder cannot escape liability by the misrepresentation of any officer of the company: *Addie's Case*, 1 Sc. App. 145, and other cases cited in the fourth reason of appeal.

*Kerr*, Q. C., with him *Cassels*, for the respondent. The real question is, whether the 6th plea is a good plea, and on the authority of *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29, the plea is good. There was no duty on the defendant after the statement of the secretary of the company to search the ledger, journal, and other books of the company. Indeed until he became a shareholder he had no right to do so. See



also *Spargo's Case*, L. R. 8 Chy. 407, 410; *Forbes's Case*, *Dente's Case*, L. R. 8 Chy. 768; *Fothergill's Case*, Ib. 270; *Leifchitt's Case*, L. R. 1 Eq. 231; *Coates's Case*, L. R. 17 Eq. 169; *Hartley's Case*, L. R. 18 Eq. 542. The company could not recover against the defendant, and the shareholder is in no better position, 27 & 28 Vic. ch. 23 sec. 5, sub-secs. 10, 27. The right of the creditor and the liability of the shareholder is measured by the contract the shareholder enters into, and the Court will not extend the contract. He also referred to *Guest v. Worcester &c., R. W. Co.*, L. R. 4 C. P. 9; *Currie's Case*, 3 DeG. J. & S. 367; *Buckley on Joint Stock Companies*, 65, 66. The Provincial Government had no power to issue the charter, as it related to navigation, a subject which is under the exclusive control of the Dominion Government: *B. N. A. Act*, sec. 91, sub-sec. 10; sec. 92 sub-sec. 10, 11.

September 15, 1876 (a). DRAPER, C. J. A.—This action is founded on the statute of Canada 27–28 Vic. ch. 23, which authorizes the granting charters of incorporation to certain companies under which the Lake Superior Navigation Company (limited), was incorporated in the year 1871. The 27th section of that Act provides that each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company, to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable with costs against such shareholder.

The plaintiff claims to recover from the defendant, as a shareholder in the company above named, the amount of a judgment recovered against the company, for which an execution had issued, and was returned *nulla bona*.

The question in dispute arises on the sixth plea, which states that the shares, as holder whereof the defendant was

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(a) *Present*.—DRAPER, C. J. A., BURTON, PATTERSON, and MOSS, JJ. A.

sought to be made liable, were issued by the company as fully paid up shares, and thereafter the defendant by several mesne transfers became, for valuable consideration paid in good faith, purchaser thereof, under the full belief that the said shares were fully paid up, and the same were transferred on the books of the company to him as prescribed by the letters patent of incorporation, and the defendant accepted the same as fully paid up shares and not otherwise.

The charter of incorporation recited *inter alia* that notice had been given, one month prior to the presenting of the petition for incorporation, setting forth various particulars required by the statute, and among them that the amount of the nominal capital of the company was \$64,000, the number of shares 128, the amount of each \$500. On this petition, and proof to the satisfaction of the Lieutenant-Governor in council that the preliminary requirements of the Act had been complied with, the charter was issued, and the company went into operation, there being when the charter issued \$32,500 of the stock subscribed, equal to 65 shares.

After some time it appeared that additional funds were required to carry on the business, and at a meeting of the directors, held 28th February, 1872, it was resolved to call a special general meeting of the shareholders, to lay before them a proposal to the effect that the unsubscribed balance of the capital stock should be allotted to the shareholders in proportion to the number of shares held by them at that time, at the rate of sixty dollars per share.

Accordingly a special general meeting of the shareholders was held on the 15th March, 1872, when the allotment of the unsubscribed stock was agreed to, and resolutions were passed for the carrying of it into effect. Under this resolution it was proved that ten shares were issued to Thomas Griffith, at the rate or price of sixty cents on the dollar, which price he paid up, and this payment was accepted as fully paying up these shares; and it was further sufficiently proved that Thomas Griffith transferred fourteen of these shares to William Griffith, by whom they were afterwards transferred to the defendant.

The unallotted shares which were in the hands of the company, seem to have been the only means they could resort to in aid of the undertaking, and for these at their nominal value there were no purchasers. Their capital, *i. e.*, the money paid for the shares subscribed for, was exhausted, and the holders of such shares were compelled to increase their stock, and they mutually agreed to do so, paying for each share of five hundred dollars only three hundred. The evidence, in my judgment, conclusively establishes that this payment was agreed to be between the shareholders and the company in full for the shares. But the plaintiff insists, that although such sale and allotment was valid in vesting the shares in those to whom they were allotted, that they were shares not paid up in full, and he claims payment of a debt due to him by the company from the defendant as a holder of such shares.

He must in effect argue, that by the acceptance of them the shareholders so accepting engage to pay (to borrow a phrase from the English cases) money or money's worth to the nominal value of each share.

If this had been understood at the time the unsubscribed shares were allotted and accepted, it seems to me quite certain that the company would then have broken down. Such stock, if marketable, would have been an available resource; but the evidence shews there were no purchasers at that price; and if the company had then been wound up, this stock would have been a dead letter.

It could have been no advantage to the company or its creditors to let it remain so. On the best consideration I can give, I think they adopted this course in perfect good faith.

Then was it contrary to the true spirit and intention of the law, and although binding and effectual as to the accepting of the shares, void as to payment being in full? In other words, under the charter and statute taken together, was it competent for the directors to allot shares as fully paid up, when sixty dollars for each share of one hundred dollars was all that was paid?

Who were the parties interested when the arrangement was carried into effect? Apparently the corporation on the one hand, and the shareholders on the other. They agreed, and the terms are established and proved, as well as that each party fulfilled their respective engagements; but the plaintiff claims that all persons who then were or afterwards became creditors of the company, could insist that those who accepted the previously unsubscribed shares, made themselves responsible to such creditors for forty cents in the dollar, in addition to the sixty cents which they have paid.

The shareholder answers, "this is not my contract; *non hæc in fœdera veni*;" and the plaintiff replies, "True, but the statute makes the shareholder, until the whole amount of his stock is paid up, individually liable to the creditors of the company to an amount equal to that not paid thereon."

It has been strenuously argued (and I confess such was my first impression) that to sustain the plaintiff's contention would be to bind the shareholders to a widely different contract from that into which they entered, and that the cases of *Ex parte Currie*, 3 DeG. F. and J., and *Leif-childs' Case*, L. R. 1 Eq. 231, were clearly in the defendant's favour.

To these similar cases might be easily added, as *In re Anglesea Colliery Co.*, L. R. 2 Eq. 379; 1 Chy. 555; *Jones's Case*, L. R. 6 Chy. 48; *Drummond's Case*, and those cited and reviewed therein, L. R. 4 Chy. 772; *Forbes and Judd's Case*, L. R. 5 Chy. 270; *Schroder's Case*, L. R. 11 Eq. 131; and *Re Disderi & Co.*, L. R. 11 Eq. 242. *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29, was also particularly commented upon, as authorities sustaining the defence. They are all, in my opinion, distinguishable.

According to the charter of incorporation of the Lake Superior Navigation Co. (limited), there were to be 128 shares, each to be of the amount of \$500; and the nominal capital was declared to be \$64,000; but the shareholders have assumed the powers of reducing their nominal capital by forty per cent. on each of the unsubscribed shares, and



have in effect, though not in words, reduced such shares, which are fixed by their charter at \$500, to shares of \$300 each, by declaring that a payment of \$300 on each share is a payment which makes it a fully paid-up share of \$500; by so doing they have reduced the amount of their nominal capital of \$64,000.

There are two statutes of the late Province of Canada which shew how the Legislature have dealt with a very similar subject. The 12 Vic. ch. 169, "An Act to amend the Act to incorporate The Gore Bank, and to increase the capital stock of the said Bank," and the 12 Vic. ch. 185, "An Act to amend the Act incorporating the City Bank, and to provide for a reduction of its capital stock." In each of these the amount represented in the respective Acts of incorporation as constituting a share was reduced, and the whole amount of the stock authorized to be raised in each Bank, including its then estate and property, was proportionately reduced also.

If in those cases a special Act of Parliament was necessary, and if not I assume none would have been passed, I cannot hold that the directors or shareholders of the Lake Superior Navigation Co. could *sua sponte* change the amount of their shares, and thereby change the amount of their nominal capital stock.

Such a practice might lead to very dangerous consequences. I think that the terms of the charter of incorporation granted under the statute of Canada, 27 & 28 Vic., as much beyond the control of the shareholders of that company, as if their charter (as in the instances above referred to) had been contained in an Act of the Legislature.

It was, however, argued on the part of the defendant, that the sale and allotment of the unsubscribed shares as fully paid-up shares on the payment of \$300, when they were \$500 shares, was *ultra vires*, and the allotment of them was therefore fraudulent and void; in which case the defendant, a transferee is not liable; that if the original contract was good, the shares were paid up in full; and if

it was not, they were issued fraudulently, and in violation of their charter.

I do not see how Thomas Griffith, being himself a shareholder in the company, to whom the shares now held by the defendant were allotted, could be heard to allege that the issue of them was fraudulent and void, and as against a creditor of the company to deny that he accepted and held them, though they wrongfully issued as paid-up shares, as he must be taken to have known, though he was under a mistaken belief of the rights and powers of the company so to issue them. There are numerous cases in the English Courts where parties, to whom shares had been issued as fully paid, when they were not so, have, when the company was wound up, been held liable as contributories. The shares in question in this case were part of the assets of the company. If issued as fully paid, the company were bound to have got money or money's worth for them; if they were only paid in part, the unpaid portion was a fund on which creditors had a statutory claim. The language of Lord Romilly, in the *Baron de Beville's Case*, L. R. 7 Eq. at p. 15, describes the position of a subscriber for shares, "When he subscribes for paid-up shares alone, and they are not paid up, then the subscriber is liable to calls." I take the law to be the same as to a transferee of shares. If he purchases shares as paid up, and they are not paid up, he becomes liable to a creditor of the company under our statute.

I confess that during the argument, and even for some time afterwards, the inclination of my opinion was the other way; but my final conclusion is, that the appeal should be allowed, with costs, and the rule to enter a verdict for the plaintiff in the Court below, which was discharged, should be made absolute.

BURTON, J. A.—The Lake Superior Navigation Co. (limited), was established by charter granted by the Lieutenant-Governor of Ontario, under the provisions of the 27 & 28 Vic. ch. 23.

One Thomas Griffith was an original shareholder in the company, but the capital originally subscribed being exhausted, and every other effort to obtain additional capital having failed, the directors resorted to the device of issuing the balance of the unsubscribed stock at 60 cents in the \$1 by allotment among the then existing shareholders, in proportion to the number of shares then held by them; and a special general meeting of the shareholders was called for the purpose of considering it. That meeting was accordingly held, and although all the shareholders were not present or represented, no opposition was offered to the proposal.

Under this arrangement Thomas Griffith subscribed for 16 additional shares, upon which he paid sixty per cent., receiving scrip certificates. These, with others, he assigned to his brother, William Griffith, who assigned them to the defendant.

In the transfers they are referred to as fully paid-up shares, and it is clear upon the evidence that the defendant was under the *bonâ fide* belief, when he accepted the transfer, that they were in fact fully paid-up, and that he made every reasonable enquiry from the officers of the company before he accepted a transfer of the shares.

A judgment was obtained against the company by the plaintiff, and an execution having been issued against them and returned unsatisfied, this action is brought against the defendant, to recover the amount from him, to the extent of the balance remaining due on the shares acquired by him under these circumstances.

He pleads, by way of equitable defence, that the shares in question were issued to Thomas Griffith as fully paid-up shares, and were entered on the books of the company as fully paid-up, and thereafter by divers mesne assignments, the defendant, for valuable consideration, and in good faith, became the purchaser and holder thereof, under the full belief they were fully paid-up, and without any knowledge or notice that they had not been; and that they were transferred on the books of the company to the defendant in

the manner prescribed by the letters patent, and the defendant accepted the same as fully paid-up, and not otherwise.

The case was tried before Strong, J., who decided that defendant was a *bond fide* purchaser, without notice. He reserved leave to the plaintiff to move, but entertaining a strong opinion (on the authority of two recent cases referred to in the judgment of the Queen's Bench) in favour of the defendant, he entered the verdict for him.

The plaintiff accordingly obtained a rule *nisi* to set aside the verdict and enter it for himself pursuant to the leave, but the Court upon argument discharged the rule; and against that judgment this appeal is brought.

The Court of Queen's Bench, in deciding in favour of the defendant, relied upon the judgment of the House of Lords, in *Jamieson v. Waterhouse*, L. R. 2 Sc. App. 29; but after a careful consideration of that case, and a number of others under the Winding-Up Acts, I think they are distinguishable from that now under review.

It is quite possible that there may be cases under those Acts in which the official liquidator, like the assignee in bankruptcy, being bound to collect and distribute the assets of the company, may be in a position in which he may assert rights against the company, and assume a position against the members of the company, which the company itself might not be in a position to assert. The Lord Chancellor, in giving judgment in that case (in which, however, it was not necessary to decide the point), strongly inclined to that view; but under the circumstances of that case, the rights of the creditors of Waterhouse, when enforced by the liquidator, could only be enforced by him in right of the company; and the question there was, whether the liquidator, standing in the place of the company, had a right to impeach the memorandum, set aside the articles, reduce the certificate, and recover in right of the company that which the company could not, as against a *bond fide* shareholder, be entitled themselves to recover; and it was held that he could not; one of the learned Lords, adopting



the language of Lord Cairns in another case, in which he said, "The liquidator represents the creditors, only because he represents the company, and through the company the rights of the creditors are to be enforced."

The liquidator there occupied no better position against the shareholder who had purchased in good faith, and upon the representation of the company, than the company.

But this is a very different case—this is an action expressly given by the statute to a creditor against the holder of any shares at the time the execution is returned unsatisfied. The creditor does not claim through the company, but the Act gives a personal, individual, and original right to the creditor as against the individual shareholder, a right paramount to any rights of the company, and which the creditor exercises adversely in order to reach certain assets of the company, namely, the amount unpaid upon any of its stock.

It is quite clear that it was not only beyond the power of the directors, but of all the shareholders, to issue the stock in the way it was issued to the prejudice of the creditors, and that although the company were estopped from enforcing calls upon this stock, any creditor having an execution returned unsatisfied would have been entitled to have enforced his claim to the extent of the balance remaining on the stock, had it at that time been standing in the name of Thomas Griffith. But Thomas Griffith was not then a shareholder; the shares at that time had been duly transferred to and accepted by the defendant; but as regards the creditors, that stock was not paid-up.

It is not material now to enquire whether the defendant, under the circumstances, could have been relieved upon discovering the true state of things before the recovery of the judgment or the institution of these proceedings; even in the case of actual frauds upon the shareholder by the directors of the company, to which fraud the creditor was not privy, it would afford no ground of defence in a proceeding of this nature. See *Henderson v. The Royal British Bank*, 7 E. & B. 356; *Daniel v. The Royal British Bank*,

1 H. & N. 681; *Powis v. Harding*, 1 C. B. N. S. 553; *Howard v. Shaw*, 9 Ir. L. R. 335.

And the case of *Oakes v. Turquand*, L. R. 2 H. L. 325, has a bearing in this view, that down to the day of the winding-up the contract is voidable on discovery of the fraud, at the option of the party defrauded; but, as decided in that case, that option not having been exercised so as to avoid the contract before winding-up, it then ceased to be capable of being avoided as against creditors.

The law as it stood previous to the Act of 1862, was much discussed in that case; and Lord Cranworth, in giving judgment, is reported to have said: "If the present question had arisen under either of these statutes," (statutes like our own, giving a direct remedy to the creditor against the individual shareholder), "the right of the creditor could not have been controverted."

It would have been no answer on the part of any person who had agreed that his name should be on the list of shareholders, and against whom a *fi. fa.* had been sued out, to say that he had been induced by fraud to become a shareholder.

He then considers the difference between that state of the law and the change effected by the Act of 1862, and proceeds, "The winding-up is but a mode of enforcing payment. It closely resembles a bankruptcy, and a bankruptcy has been called, not improperly, a statutable execution for the benefit of all creditors."

The same description, he adds, may be given to a winding-up, and as in the bankruptcy of an ordinary partnership, every person against whom a judgment creditor of the firm could have levied execution as a partner, would be liable to have his estate administered in the bankruptcy, just so, every person against whom a creditor could have issued execution would be liable to have his estate dealt with under a winding-up order.

The case merely establishes therefore that when a person has, with his own consent, become fully a legal shareholder by registration of shares which he has agreed to take,

equities, which might be good as between the shareholder and the company, cannot, after the winding-up, be set up as against the creditors of the company.

In the present case, if Griffith and the company had *fraudulently* represented to the defendant that the shares were paid, when in point of fact nothing had been paid upon them, that would have entitled him, on discovery of the fraud, to rescind the contract, if done before the right of the creditor had attached; but if no such rescission had taken place previously, the fraud would not, after action brought by him, furnish any defence. *A fortiori* what is alleged here can be no answer when the company and the transferor appears to have acted under a mistaken view of the law, but with no fraudulent intent. The company cannot by an agreement with a particular shareholder save him from that liability which the Act of Parliament has imposed upon him; and it appears to me, that as to creditors, the transferee of such shareholder stands in no better position. He is the party against whom the statute gives the remedy; and if he cannot prove payment, he is, in my opinion, without a defence.

For these reasons I think the judgment of the Queen's Bench erroneous, and that the rule to enter the verdict for the plaintiff should be made absolute, and this appeal allowed with costs.

PATTERSON, J. A.—The Lake Superior Navigation Company (limited) was incorporated under the statute of Canada, 27 and 28 Vic. ch. 23, by letters patent, dated 25th February, 1871. Under that statute the applicants for a charter were required to give a notice of their intention to apply for a charter, which notice was to be published in the *Gazette*; and to state, among other things, the nominal capital of the company, the number of shares, and the amount of each share, the amount of the stock subscribed, and the amount paid in or to be paid in before the granting of the charter. These particulars were to be recited in the letters patent which could not issue until not less than

one-half of the proposed capital had been subscribed in good faith, and a certain per centage paid in.

By section 5 sub-section 19, a book was required to be kept, shewing, among other things, the amounts paid and remaining unpaid respectively on the stock of each shareholder. Sub-section 10 of section 5 gave the directors power to make calls in accordance with by-laws of the company; and sub-section 11 provided that not less than 10 per cent. of the allotted stock should be called in within one year from the incorporation of the company, and at least 10 per cent. each year thereafter till the whole should have been called in. Sub-sections 16, 17, and 18, made provision for increasing the capital stock, after the whole capital stock of the company should have been allotted and paid in, but not sooner; and sub-section 27 enacted that each shareholder, until the whole amount of his stock had been paid up, should be individually liable to the creditors of the company to an amount equal to that not paid up thereon, but should not be liable to an action therefor by any creditor before an execution against the company had been returned unsatisfied in whole or in part, and that the amount due on such execution should be the amount recoverable with costs against such shareholders.

The nominal capital of this company was \$64,000, in 128 shares of \$500 each, and the patent recites that \$32,500 had been subscribed, and \$3,400 paid in; whether any more had been subscribed prior to the meeting of the directors, held on 28th of February, 1872, we are not informed, nor is it material.

It is shewn that all the subscribed capital had been exhausted or invested in the steamer Cumberland, and more money was required by the company, when the directors, on the 28th of February, 1872, resolved to call a special general meeting of the shareholders to lay before them a proposition to allot the unsubscribed balance of the stock among the shareholders, in the proportion of the shares they then held, at 60 per cent.; or \$300 per share instead of \$500. This proposition was adopted by the meeting of share-



holders on 15th May, 1872. Some shares were under this arrangement allotted to Thomas Griffith, who paid for them at the rate of \$300 a share. He transferred them to his brother William, who transferred them to the defendant, who accepted them and became a director of the company.

The plaintiff, who has an unsatisfied execution against the company, brings this action under sub-section 27 of section 5, to obtain satisfaction out of the \$200 per share unpaid upon the shares in question.

The defendant shews that he took the transfer of these shares under a written transfer from William Griffith, which stated that \$500 had been paid on each share; and that, before he took the transfer, he made enquiry of the secretary of the company, who told him that they were paid-up shares; and that he had no notice or knowledge that the shares were not fully paid up, but took them understanding that they were fully paid up.

The shares were taken by the defendant, who was cashier of the Royal Canadian Bank, in trust, on account of a composition with Thomas Griffith for a debt due by him to the bank, and at a valuation of 40 cents in the dollar, or \$200 per share.

The Court of Queen's Bench held that under these circumstances the defendant was not liable, and the plaintiff appeals from that decision.

It is clear, that the assumption to issue the stock at \$300 instead of \$500 per share was *ultra vires*. The statutory proceedings fixed the shares at \$500, and neither the directors nor the shareholders had power to alter that amount. The law was that \$500 a share should be paid in at the minimum rate of ten per cent. per annum; and the resolution that only \$300 should be paid was entirely unwarranted.

The questions which arise under sub-section 27 are, 1st, was the defendant a shareholder? and, 2nd, was his stock paid up? These seem to me to be the only questions with which the creditor of the company is concerned.

The law aims at securing to the creditor the security of the

paid-up amount of \$64,000. The books of the company are (by sub-section 22 of section 5) open to the inspection of the creditors. They shew that the whole 128 shares are allotted. The creditor's enquiry is, who are the shareholders? And there seems but the one answer on the part of this defendant. Undoubtedly he is a shareholder, and he does not now contend that he is not.

Then are his shares paid up? There is no pretence for saying that they are. It is not answered that they are; but the answer is, that, when the defendant accepted the shares, he was led to believe by Griffith that \$500 a share had been paid on them. It is also said that the secretary of the company gave the same information. I do not so read the evidence. If the defendant went to the secretary without any other idea in his mind than that the shares, to be fully paid up, must necessarily have \$500 paid on each of them, no doubt the secretary's answer to him would leave him with the idea that \$500 had been paid. But it appears that these shares were called by the officers of the company paid-up shares, by which they understood and meant nothing more than that no calls were to be made upon them; and all the secretary did, was to tell the defendant that the shares were paid-up shares. Setting aside the question of how far the company might be responsible for a representation made by the secretary in answer to an inquiry which was not made with reference to a transaction with the company, but to one between other parties, it would be very hard to say that the answer, as stated in the defendant's own evidence, contained any further representation than that the shares were what was understood in the office of the company as paid-up shares.

But whatever the representation may have been, and whether made by Griffith or by the secretary, and whether the secretary was or was not authorized to make it on behalf of the company, the facts remain, that the defendant became and continued to be the holder of the shares, and they were not paid up, which covers the whole ground.

The case of *Waterhouse v. Jamieson*, L. R. 2 Sc. App.

29, on the authority of which the judgment in this case seems to have proceeded, does not really apply.

The liability of the shareholder in that case was founded on the articles of association, which contained the express statement that of the nominal capital of £105,000, £100,000 had been paid up, and £5,000 remained to be paid. It was held that the company could not have proceeded against the shareholder for more than £5 per share, and that the liquidator had only the same powers as the company had.

The contract between the shareholder and the company there was that he should pay only £5 per share; and the decision was, that he was only liable upon that contract. There was no statutory liability such as created by subs. 27.

The decision in *Oakes v. Turquand*, L. R. 2 H. L. 325, is much more in point. It was there held that a shareholder, whether by original allotment or by purchase of shares, who has been induced to purchase shares by the fraudulent misrepresentation of the directors, although entitled as against the company to rescind the contract, and although the company could not enforce calls against him, is nevertheless liable to contribute to the assets of the company required for the payment of creditors, if he remains on the registry of shareholders. The Lords in that case approved and followed the case of *Henderson v. Royal British Bank*, 7 E. & B. 356, which in its facts very nearly resembles the case before us.

Mr. Kerr ingeniously argued that the defendant should not be treated as the holder of these shares, because he bought paid-up shares. This is a question of fact which does not seem to have been presented at the trial, where the learned Judge found merely that the defendant was a purchaser for value without notice.

I do not wish to state, as a rule always applicable, that a verdict may be supported on any ground, because cases may occur in which, if the point had been made at the trial, further evidence would have been offered: see per Jarvis, C. J., in *Graham v. Chapman*, 12 C. B. 101; per

Bramwell, B., in *Noble v. Ward*, L. R. 1 Ex. 120. The present verdict cannot be supported on the ground now suggested.

The whole evidence points to the purchase of the specific shares which Griffith had to sell. The defendant was not in the market to buy such shares as he fancied; he was taking what he could get to secure Griffith's debt. There is no suggestion that the defendant had any other shares, or that these were not the specific shares on which he qualified as director; and the very finding of the learned Judge that he took the shares for value and without notice is, in effect, a finding that these were the shares which he purchased.

I have referred to the cases cited by Mr. Kerr on the last mentioned point, and on the case generally. Some of them support in a pretty direct manner the conclusions I have come to, as, *e.g.*, *Guest v. Worcester, &c., R. W. Co.*, L. R. 4 C. P. 9; *Forbes's Case* and *Dent's Case*, L. R. 8 Chy. 768; *Spargo's Case*, L. R. 8 Chy. 410; and *Black & Co.'s Case*, L. R. 8 Chy. 254.

The appeal should be allowed with costs, and a verdict entered for the plaintiff for \$852,35.

Moss, J. A.—I am of the same opinion. The plaintiff's rights are founded upon the statute under which the company was constituted. Reading sub-section 27 of section 5, in its natural and obvious sense, it is clear that the plaintiff, who is the holder of a judgment against the company upon which an execution has been returned unsatisfied, is bound, *prima facie* at least, to establish two propositions only against the defendant. First, that he is a shareholder; secondly, that the whole amount of the stock he holds has not been paid up.

The first proposition is scarcely made the subject of serious controversy. It would indeed be difficult to argue with any appearance of plausibility that the defendant is not to be treated as a shareholder, after a regular transfer had been made to him, and entered in the proper book in con-



formity with the requirements of the statute, and after he had been elected to the office of director, and acted in that character upon the qualification of these shares.

The second proposition seems to me to be not less clearly established. The shares held by the defendant have not been paid up in fact. Each of these shares was fixed by the charter of incorporation at \$500, and but \$300 have been paid on each. It is true, that these shares were issued in pursuance of a resolution of the directors, that the unsubscribed balance of the capital stock provided for by the charter should be allotted among the shareholders at sixty cents on the dollar, in proportion to the number of shares they respectively held; and that they were accordingly treated by the company as paid-up shares, and no demand for any further payment was made upon the holders.

Whether this resolution was submitted to, and expressly sanctioned by the shareholders, does not appear; but a special meeting was directed, by a resolution of the board, to be called for the 6th March, 1872, to consider this proposition of allotment; and a special meeting was held on 15th March, 1872, at which several shareholders were present or represented, when a resolution was passed that stockholders who had not already increased their stock must do so, and pay the amounts to the treasurer within fifteen days from the date of notice, to the extent of fifty per cent., or otherwise they should not be allowed their proportion of the unsubscribed stock at the rate of sixty per cent.

It seems to be a reasonable inference from the facts stated in the case that all the shareholders never did assent to the issue of the unsubscribed stock upon these terms; but even if the assent of every individual member had been given, the rights of creditors could not have been thus destroyed or impaired. They could not by any act of theirs thus set aside the charter, and reduce the amount payable by persons taking shares. This is so obvious in principle, and so well settled by authority, that it would be a mere waste of time to dwell longer upon that branch of the subject.

Indeed, I ought to remark, in justice to the learned counsel for the defendant, that I did not understand them to contend that Griffith, the original taker of the shares, could have successfully asserted in answer to a creditor that that they were paid up.

Griffith would have failed, because they were not in fact fully paid up in money or in money's worth; and the construction which an ordinary reader would place upon the statute is, that any subsequent holder would be liable for the unpaid amount.

The attempt made is, to import into the statute, in favour of a subsequent assignee, who purchased the shares for value, and without any notice that they were not in fact fully paid up, an assumed equity, by force of which a creditor is precluded from recovering from him the amount actually unpaid.

This defence is set up by the sixth plea, which alleges that the shares in question were issued by the company as fully paid-up shares to Griffith, and were taken and accepted by him as fully paid-up shares in the capital stock, and that therefore the shares were entered upon the books of the company as fully paid-up shares in the hands of and held by Griffith; and that the defendant, by several mesne transfers, for a valuable consideration, paid in good faith, became the holder of the shares in the belief that they were fully paid up, and without any notice or knowledge to the contrary; and that the shares were transferred in the books of the company to the defendant in the manner prescribed by the charter, and the defendant accepted them as fully paid-up shares, and not otherwise.

The averment that the shares were entered upon the books of the company as fully paid-up shares held by Griffith, whether material or not, is not sustained by the evidence. On the contrary, it appears that while the shares originally held by him are expressly so entered, there is no corresponding entry opposite the additional shares now in question. It also appeared in the books that Griffith had only paid \$300 each for these shares. The counterfoils in the share book shewed the same fact.

If the defendant had examined these records, he would have learned the true state of the case. This examination he did not make; but as the certificate did not purport to be paid-up stock; or, in the language of the defendant himself, as "the scrip did not on its face shew it was paid up," he asked the secretary of the company, "If they were fully paid-up shares?" and he told them they were.

In the view we have taken of this case, it is unnecessary to enquire whether the defendant was reasonably vigilant, or whether he was chargeable with such a degree of negligence as to preclude him from claiming that he was an innocent purchaser without notice; but so much was said about the hardship of a decision adverse to the defendant, and so much stress was laid upon the requirements of natural justice in the case, that it is not without interest to pause for a moment to glance at the relative positions of the parties in this respect.

The defendant contenting himself with the assurances of Griffith and of the secretary, accepted a transfer of these shares on 25th April, 1873, and thenceforth appeared as a holder of these shares upon the records which the statute has required such companies to keep for the guidance and information of the public who may have dealings with them; and these same records shewed in the clearest manner that these shares had not been fully paid up.

Every person subsequently invited by the company to give it credit, who took the prudent precaution of first examining the list of shareholders, would perceive that the defendant was the holder of ten shares on which \$2,000 remained unpaid. This formed an asset of the company which he might reasonably regard. He could know nothing of the secretary's statement, which is now relied upon as sheltering the defendant from liability.

That he is entitled to urge that he gave credit upon the faith of this liability being an asset of the company, sufficiently appears, if authority were needed, from the observations made in *Henderson v. The Royal British Bank*, 7 E. & B. 356, and other cases. The plaintiff occupies this

favourable position, for he did not become a creditor until after the shares had been transferred to the defendant. My perceptions of natural justice do not enable me to understand, if such considerations must be resorted to, the superiority of the defendant's claim to resist, over that of the plaintiff to demand, payment.

The gist of this defence is, that the plaintiff without any fraud or default on his part, without any sin of commission or omission, is to be deprived of a statutory remedy, because the defendant trusted to or perhaps misunderstood the oral statement of the company's secretary.

I find neither in reason nor precedent any ground for importing into the statute any such qualification of the defendant's liability or restriction of the plaintiff's rights. The language of the enactment is identical with that of the Railway Act, which came under consideration in *Macbeth v. Smart*, 14 Grant 298; *Ryland v. Delisle*, L. R. 3 P. C. 17; and other cases of undoubted authority.

These cases have placed it beyond doubt that a creditor of such a company when suing a shareholder does not claim through the company or under the company, but that he has a paramount right accorded to him by the statute. Even if it was certain that the company could not maintain a suit to recover from the defendant the unpaid balance upon his shares—a question upon which I do not desire to express an opinion—that would not upon the reasoning of these cases absolve him from liability to a creditor.

This may be shewn by a very plain illustration. The company cannot sue a shareholder until a call has been regularly made; but a creditor can proceed against him at once for the full amount of his subscription, and that even in cases when calls could only be made after the observance of certain formalities and the lapse of certain intervals.

I do not think that any better exposition of the law can be found than the language of the Chief Justice of this Court, in pronouncing his opinion in *Macbeth v. Smart*, 14 Grant p. 310: "Nothing can be clearer than this language,



both as regards the liability of the shareholder and the remedy of the creditor of the company. The former is subject to an individual liability for an amount equal to the amount unpaid upon his shares, *until* the whole amount of his stock *has been paid up*; the latter has the right to recover from the shareholder the amount due upon the execution against the company; provided always, that so much is unpaid upon the shares. The creditor's right is made to depend upon the fact, that the shareholder has not as yet paid up his stock in full. This right differs from that given to the company, who can only require payment in the manner and after the delays imposed by the statute" (in this case by the by-laws), "the creditor can call for immediate payment. \* \* The payment must have been made, or the creditor's claim is untouched. \* \* The statute gives him (the judgment creditor) a new right, founded, it is true, upon his judgment, but not a right derived from or through the company, his debtors. No act or consent of theirs is necessary to give effect to this new right, which depends on three things: first, that he is a judgment creditor of the company unsatisfied; second, that they have no assets which he can reach by execution; third, that Macbeth is a shareholder in the company, and has not paid up in full. That is all that the statute requires."

The opinion of Hagarty, J., who concurred with the Chief Justice, places the rights of a creditor in a very clear light.

These views were much canvassed at the time, but subsequent authority has put their correctness beyond question. They seem to me not less applicable to the present case, than that then under adjudication.

The clauses of the statutes are identical, and they must receive the same interpretation.

The case of *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29, upon which the judgment of the Court of Queen's Bench proceeded, seems to be quite distinguishable. The real point decided in that case was, that the liquidator could not alter or enlarge the memorandum and articles of asso-

ciation, in which it was stated that certain shares were paid up to a certain amount. That was the basis upon which the company was constituted, and the registered memorandum gave notice to the public that these shares were to be so treated, and that only a certain amount was to be paid in respect of these.

*In re Hoylake R. W. Co.*, L. R. 9 Chy. 257, does not assist the defendant's contention. On the contrary, the language of Sir George Mellish, L. J., supports the plaintiff's view by shewing that his remedy is against the defendant, and not against Griffith.

The other cases cited upon the argument do not seem to have any special bearing upon the question for decision. They only deal with the point, of whether under certain circumstances shares were to be treated as paid-up, money or money's worth having been given.

*Appeal allowed (a).*

# THE TRUST AND LOAN COMPANY V. COVERT AND RUTTAN.

Rvr. 1 SCR 564.

*Deed—Escrow.*

To a declaration on covenant for quiet enjoyment in a mortgage to the plaintiffs, executed by T., the defendants' grantee, one defendant pleaded that T. did not, after the making of that deed, convey to the plaintiffs.

The deed from defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiff was dated 10th April, 1855. Both were registered on the 28th July—the deed first. It appeared that there were two mortgages from T. to the plaintiffs on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August.

*Held*, in the Queen's Bench, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title, and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover.

*Held*, on appeal, reversing the judgment of the Queen's Bench, HAGARTY, C. J., dissenting, that there was no sufficient evidence to shew that the mortgage was not intended to take effect when it was executed on the 10th April, 1855.

(a) This case has since been argued in the Supreme Court, and stands for judgment there.

Appeal from the judgment of the Court of Queen's Bench, refusing a rule *nisi* to set aside the verdict for the plaintiffs on the new trial, and enter a verdict for the defendant Ruttan.

The pleadings and facts upon which the new trial was obtained, are sufficiently reported in 32 U. C. R. 222.

The trial took place at the Spring Sittings, 1875, before Richards, C. J., who decided that under the evidence and the judgment of the Court (sec. 32 U. C. R. 222) the reasonable inference was, that the mortgage was not accepted by the plaintiffs until after the deed from the defendants to Thompson, and he found for the plaintiffs, and assessed the damages.

In Easter term, 1875, *Armour*, Q. C., moved for a rule to set aside the verdict for the plaintiffs, and to enter a verdict for the defendant Ruttan, on his second plea.

After consideration the Court refused the rule *nisi*, and thereupon the defendant Ruttan appealed.

The following were the appellant's reasons of appeal:—

The said rule *nisi* ought to have been granted, because the learned Chief Justice, who tried this cause, ought to have found a verdict for the defendant Henry Jones Ruttan on the said issue, on the following grounds:—

The mortgage produced from Thompson to the plaintiffs bore date the 10th day of April, A.D. 1855, and before the deed produced from Covert and Ruttan to Thompson, which bore date the 22nd day of June, A.D. 1855.

The legal presumption therefore was, in the absence of evidence to the contrary, and there was no such evidence, that the said mortgage and deed were respectively delivered on their respective dates.

The evidence of the witness Boulton shewed that the said mortgage and deed were delivered at their respective dates, and at all events that the said mortgage was delivered before the said deed.

The legal presumption was, in the absence of evidence to the contrary, and there was no such evidence, that the

plaintiffs accepted the said mortgage at the time of its delivery.

When Thompson executed the mortgage, he completely divested himself of the estate thereby conveyed, and he never did, nor was called upon to do thereafter, any act in respect of the execution or delivery of the said mortgage. The said estate therefore completely passed from him at the time of the execution by him of the said mortgage, and so passed before the execution of the said deed from Covert and Ruttan to him.

The estate of which Thompson so divested himself could not remain suspended, but passed at once to the plaintiffs, and became vested in them, subject, however, to be disclaimed by them if they thought fit so to do, which, however, they never did, but until such disclaimer the said estate would remain vested in them.

If actual acceptance by some overt act of the plaintiffs were necessary in order that the estate purported to be conveyed by the said mortgage should be vested in them, a like overt act of actual acceptance by Thompson was necessary in order that the estate purported to be conveyed by the said deed should be vested in him, and none such was proved; a verdict ought therefore to have been entered for the defendant Ruttan, on the plea of *non est factum*.

Admitting that the plaintiffs had the right to take the mortgage, and to keep it until they should have an opportunity to determine whether they would accept it or not, and then to refuse it or accept it, the estate thereby conveyed would nevertheless vest in them, and remain vested in them until such determination was arrived at.

Admitting that the estate purported to be conveyed by the said mortgage did not vest in the plaintiffs until an actual acceptance thereof by them by some overt act, yet such actual acceptance would be of the estate of which Thompson divested himself by his execution of the said mortgage, and would have relation back to the time when he so divested himself.

And the defendant Henry Jones Ruttan relies upon the



following authorities in support of his contention:—*Hayward v. Thacker et al.*, 31 U. C. R. 427; *Muirhead v. McDougall et al.*, 5 O. S. 642; *Mackechnie v. Mackechnie*, 7 Grant 23; *Exton v. Scott*, 6 Sim. 31; *Muir v. Dunnet*, 11 Grant 85; *Childers v. Childers*, 1 K. & J. 315; *McFarlane v. Andes Insurance Co.*, 20 Grant 486; *Doe Spafford v. Brown et al.*, 3 O. S. 92; *Thompson v. Leach*, 2 Ventris 198, 3 Mod. 296; *Butler & Baker's Case*, 3 Coke 25; *Doe Garnons v. Knight*, 5 B. & C. 671; *Xenos v. Wickham*, 13 C. B. N. S. 381, 14 C. B. N. S. 435, L. R. 2 H. L. 296; *Cumberlege v. Lawson*, 1 C. B. N. S. 709; *Cartwright v. Glover*, 2 Giffard 620.

The respondents' reasons against the appeal were as follows:—

1. On the argument of the appeal, the respondents will contend that the judgment of the Court in refusing the rule *nisi* was correct, and should be sustained, and will rely upon the judgment of the Court of Queen's Bench, as reported in 32 U. C. R. 222, and the authorities therein cited.

2. The respondents will argue that they were at liberty to prove the date of the delivery of the mortgage to be different from the date set forth in the said mortgage: *Trust and Loan Co. v. Covert*, 32 U. C. R. 222, *Washburn on Real Property*, 3rd vol., 262; *Bell v. McKindsey*, 3 Grant, Error and Appeal, 1.

The case was argued in appeal on the 15th June, 1876 (a).

*Robinson*, Q. C., for the appellant.

*Bethune*, Q. C., for the respondents.

September 15th, 1876. DRAPER, C. J.—On the 22nd of June, 1855, the appellant and Covert, another of the defendants, conveyed lot No. 6 in the 9th concession of Hamilton, in fee, to one Henry H. Thompson, and entered into the usual covenant for quiet enjoyment.

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(a) *Present*.—DRAPER, C. J. A.; HAGARTY, C. J. C. P.; BURTON, J. A.; BLAKE, V. C.

Thompson, by deed dated 10th April, 1855, had mortgaged the same land to the plaintiffs.

Both these instruments were registered on the 28th July, 1855, the entry of the first being numbered 836; the entry of the mortgage being numbered 837.

It appeared that the defendants, Ruttan and Covert, though seized in fee of the land in question, held it only in trust for the wife and children of Thompson, though no such trust appeared on the face of the conveyance under which they held; and this trust was established by a decree in Chancery.

Thereupon the plaintiffs brought this action as assignees of the covenant for quiet enjoyment, contained in the deed of the 22nd June, 1855, and made by defendants to Thompson.

The question was fairly stated in the elaborate judgment of my brother Wilson, in granting the new trial, thus: 1st. Whether the mortgage by Thompson to the plaintiffs, although executed before the deed to Thompson from the defendants, was delivered as a deed by Thompson to the plaintiffs before or after he got the conveyance from the defendants. 2nd. Whether, if the defendants' deed were subsequent to the mortgage, the plaintiffs can, under the mortgage, maintain this action against the defendants. The judgment of the Court below turned, however, upon the acceptance of the mortgage by the plaintiffs.

The evidence given on that trial was not so full as on the second, and on the first trial both the mortgage and the deed were admitted. On the second Mr. E. T. Boulton was examined. He said his father was the agent of the plaintiffs at Cobourg, but that he, the witness, did most of the business, and saw both the deed and the mortgage executed, though it is not noted whether he was a subscribing witness or no.

He said the mortgage must have been drawn at Kingston, then, as appears *aliunde*, the head office of the plaintiffs. He only recollected going to the Globe (an hotel in Cobourg) once, and seeing Mr. and Mrs. Thompson once. The mort-

gage "was sent by the company to be executed; I have no doubt I took it away; I can't recollect if I sent it down to Kingston or kept it until it was registered." Now here we have the facts, that the plaintiffs sent the mortgage to their agent to get it executed; that it was executed by the mortgagor and his wife; that it was after execution taken away by the agent or his clerk, who did most of this business, and who either sent it to the plaintiffs or kept it until it was registered, the witness's father being the registrar.

As regards the signing, sealing, and delivery of this mortgage, I take the evidence to be ample. The plaintiffs' agent takes it away, and it is produced by the plaintiffs as part of their case. Everything essential to the complete *making* of a deed is shewn. The plaintiffs, being the mortgagees, and the instrument being under their control, will be presumed to have procured its registration, and their right to maintain this action is derived from and through Thompson, to whom the defendants conveyed. I must dissent from my brother Wilson when he says, "the mortgage offered was not *taken*." I think the evidence conclusively proves it *was* taken, and by their agent; and to my learned brother's observation that it is "not unreasonable to hold that the mortgage, although perfected in form, was not absolutely *delivered*," I venture to reply that no other act of delivery subsequent to that of the 10th of April, 1855, has been shewn, and certainly none to limit the quality of delivery, *i.e.*, as delivered subject to a condition or as an escrow, not as a deed.

I incline to yield to and apply the remark of Smith, J., in *Xenos v Wickham*, L. R. 2 H. L. 306, "that it is better to adhere to plain inferences of fact, than to attempt to remedy the inconveniences of a negligent mode of doing business, by making the facts bend to the exigencies of the negligence."

Then as to the deed from the appellant and Covert to Thompson, Mr. Boulton's evidence is, "I must have received instructions to prepare the deed from the plaintiffs' office

at Kingston. \* \* I know (*sic*) Mr. Thompson's going to Kingston about the matter. I don't recollect anything specially about this. In the usual course of business the mortgage would be registered as soon as possible after I received them (*sic*) unless I received instructions to the contrary, and for that reason I have no doubt I must have received such instructions in some way by the company to see it done."

Both deed and mortgage were registered the same day, 28th July, 1855, the deed first; but the order for the payment over of the money bears date 7th August, 1855. And it does not appear that the money ever came into Thompson's hands, but was applied by the plaintiffs' company in discharging two mortgages on lot No. 5.

Therefore, as regards priority in fact, the deed, which contains the covenant on which the plaintiffs bring their action, was not executed for seventy-three days after the mortgage, during all which time it was in possession of the plaintiffs, or their agent at Cobourg. The facts establish the signing, sealing, and delivery to the plaintiffs on the day of its date, to which the plaintiffs' only answer is, we did not accept it until 22nd June, 1855, being the date of the conveyance from the appellant and Covert; and the Court are called upon to decide on the sufficiency of that answer.

It is well settled that no estate can be made to a man of anything in fee simple, for life, or otherwise, against his will, and, therefore, by the disagreement or refusal of it the estate itself, and the deed whereby it is conveyed may become void: Touchst. 284-5; and so a devisee may by deed, without matter of record, disclaim the estate devised: *Townson v. Tickell*, 3 B. & Ald. 31; and there has been a good deal of discussion as to the mode of disclaiming, and whether it could be by release, which *primâ facie* would seem to import the assertion or admission that the releasor had some interest. See *Xenos v. Wickham*, 13 C. B. N. S. 381, L. R. 2 H. L. 311; *Nicloson v. Wordsworth*, 2 Swanst. 365, and the cases referred to in the notes to that case.



It seems to me unnecessary to discuss that point, as no act which could be held to amount to a release or disclaimer of the mortgage of the 10th of April, 1855, has been proved unless, indeed, the mere fact of the delay to register could be considered in law a temporary disclaimer, for which I do not find a shadow of authority, nor do the facts in evidence give any colour to such an assumption, which would not only be unsupported by any proof, but would be repelled by the well-known rule, that the deed or other instrument cannot, in the absence of fraud or mistake, be varied by parol evidence.

It appeared plainly that the plaintiffs had agreed to accept a mortgage on lot No. 6 in substitution for two existing mortgages on another lot. The money stated to be advanced by them on the security of No. 6 was accordingly applied to the discharge of the two prior mortgages, and there is no doubt raised as to the validity of the plaintiffs' title under the mortgage of the 10th of April, 1855. But, at that date, Thompson, the mortgagor, had no title to No. 6, and acquired none until the 22nd June following. If the proper enquiries had been made before the execution of the mortgage, the defect in Thompson's title would have been discovered, and from what appears, would have been promptly removed, as it subsequently was. But the plaintiffs, on the face of the deed and mortgage, cannot claim the benefit of the appellant and Covert's covenant with Thompson, for the simple reason that it was not in existence when Thompson executed the mortgage to them; and to remove this difficulty the plaintiffs are reduced to the necessity of contending that the mortgage was not accepted by them until Thompson's title was perfected; in other words, that the truly stated date of the signing, sealing, and delivery of the mortgage should be altered so as to enable the plaintiffs to maintain this action.

In my humble judgment this, in the language of Smith, J., already quoted, would be "to attempt to remedy the inconveniences of a negligent mode of doing business, by making the facts bend to the exigencies of the negligence."

The plaintiffs' claim on this covenant was before the Court of Queen's Bench, in 1867, when I was Chief Justice, and the proceedings are reported in 27 U. C. R. 120, and again in the same Court in 1870, after I had left it (see 30 U. C. R. 239), when judgment was given for the plaintiffs on demurrer.

Then it appears the case was tried without a jury, and, on an issue joined on the appellant's plea, that Thompson did not, after the making of the deed by the defendants to him, convey the land to the plaintiffs, the learned Judge found that the mortgage was executed before the deed containing defendants' covenant to Thompson, and he therefore found for the appellant.

The Court, after argument, set aside that finding, and would have entered a verdict for the plaintiffs, but as no damages had been assessed, they ordered a new trial, without costs.

That trial took place at the Spring Sittings, 1875, before Richards, C. J., who decided that under the evidence and the judgment of the Court the reasonable inference was, that the mortgage was not accepted by the plaintiffs until after the deed from the defendants to Thompson, and he found for the plaintiffs, and assessed the damages.

In the ensuing term of Easter, a motion was made for a rule to set aside the verdict for the plaintiffs, and to enter it for the appellant, Ruttan. After consideration the Court refused the rule *nisi*, and thereupon Ruttan appeals.

The case having been repeatedly considered before other Judges, I have endeavoured to consider it most carefully.

The first judgment in which I concurred was wholly on a point of pleading. The question now in judgment was never mooted, or if even alluded to at the bar was not considered by the Court.

In my opinion the verdict for the plaintiffs should be set aside, and a verdict entered for the appellant, the defendant below.

HAGARTY, C.J.C.P.—On the best consideration I can give this case, I have arrived at the conclusion that the judgment

of the Queen's Bench is right. The case was tried before Richards, C. J., without a jury, and I think I should have found just as he did, that under the evidence the reasonable inference was, that the mortgage was not accepted by the plaintiffs until after the deed made by the defendant to Thompson. He was trying the case in 1875, and the transactions in evidence had occurred twenty years previously. The principal actors were dead, and the memory of the survivors naturally not very exact. But when we have heard all that can be detailed of the facts, the inference is, to my mind, irresistible, that the company, the mortgagees, could never have agreed to accept the estate, nor could the mortgagor have rationally expected they would so accept, otherwise than conditionally on the title being perfected. When the mortgage was in fact signed by Thompson, the legal estate was in the appellants. I cannot bring myself to believe that a mortgage professing to convey this fee simple, with covenants for title, could have been accepted by the company absolutely, or in any way but conditionally on the title being perfected. Here the title, in fact, never was perfected; at all events the mere legal estate was outstanding, and could be, and was, got in. I attach no importance to the solicitor's certificate to the effect that the mortgage "was executed on the 10th day of April, \* \* necessary for vesting the mortgaged property in this Company." The reference to the appellants' deed of 22nd June, in schedule A, may be referred to as shewing that it formed part of the title. It must be a matter of a very common occurrence that mortgages are in fact executed before the title of mortgagors is perfected. But the acceptance of the estate thereby professed to be conveyed, does not take place until the mortgagee agrees to take it as his security. He advances his money on what is reported to him to be a valid security, not on the imperfect estate professed to be conveyed to him by the mortgage as at its original date.

If it had been proved directly to us that on 10th April, when Thompson actually signed and sealed the mortgage, the solicitor had said to him: "You may sign it to-day if

you please, but of course we shall not accept it unless, and until, we find the title all right, and especially until the appellants have conveyed the legal estate to you;" to which Thompson assented, can there be a doubt but that on such evidence we must have decided that the estate was not accepted, and did not fully vest until the title was accepted? I think there could be no doubt on the point.

We have no such direct evidence here, but to my mind the facts that are before us lead directly to the conclusion that such was the substance and effect of the whole transaction. It is quite unnecessary to prove any express form of words, in order to shew that a deed is delivered or accepted only conditionally. The language of Lord Wensleydale, in *Bowker v. Burdekin*, 11 M. & W. 147, is very clear. "In this case the execution of the deed was proved in the ordinary form, and I take it to be now settled, though the law was otherwise in ancient times, as appears by *Sheppard's Touchstone*, that in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words, *but you are to look at all the facts attending the execution—to all that took place at the time, and to the result of the transaction.* And, therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow." *Millership v. Brookes*, 5 H. & N. 798, is to the same effect, that we should infer the conditional delivery from the general facts and nature of the case.

Adopting these rules, I am forced to the conclusion that the mortgagees' contention is correct, and that, as the whole result of the transaction, they never accepted the estate, nor was the operation of the mortgage complete, until after the conveyance of the legal estate by the appellants to Thompson. It is not necessary to discuss the question as to the operation of the conveyance relating back to its original execution. This relation is not allowed if possible to the prejudice of any party. It is only allowed on the principle of *ut res magis valeat quam pereat*: See *Oliver v. Mowat*, 34 U. C. R. 476.



I think the judgment of the Court, delivered by my brother Wilson, was on this point correct, and the finding of the learned Chief Justice Richards at the trial was the proper conclusion to be arrived at on the evidence.

BURTON, J. A.—This case, which was an action for breach of covenant for quiet enjoyment, was brought to trial for the second time, without a jury, before the late learned Chief Justice of the Queen's Bench, who directed a verdict to be entered for the plaintiffs.

The Court of Queen's Bench, in the ensuing term, refused a rule *nisi* to set aside that verdict, and hence the present appeal. The learned Judge, at the trial, founded his decision to some extent upon the judgment which had been pronounced by the Court on setting aside the former verdict, and that judgment is consequently incidentally brought under review.

The declaration is upon a covenant contained in a deed from the defendants, Covert and Ruttan, to Thompson, dated the 22nd June, 1855, and the issue was raised by the second plea of the defendant Ruttan, that the said Thompson (the mortgagor) did not, after the making of the covenant declared on, convey the said lands to the plaintiffs as alleged.

In point of fact, the mortgage from Thompson to the plaintiffs bears date in April, preceding the deed of June, and the question is, whether there was any evidence to sustain the finding of the learned Judge in favour of the plaintiffs upon this issue.

The question of whether the mortgage was delivered as an escrow is a matter of fact, and it is quite clear upon the authorities that it is not necessary that the delivery of a writing as an escrow should be by express words, but that if, looking at all the facts attending the execution, and to the result of the transaction, it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will operate as an escrow only.

Was, then, this mortgage at the time of its execution intended by both parties to it to be finally executed and binding? *Primâ facie* when a deed is formally sealed and delivered, and there is nothing to qualify this delivery, it takes effect at once. What evidence then is there of anything said or done at that time from which a condition postponing its operation is to be inferred? I must confess that so far from seeing anything which can be reasonably construed as a condition qualifying the delivery, such evidence as there is goes to establish that it was in the contemplation of both parties that it should be unqualified, and that the deed took effect from that moment.

In the first place the mortgage was prepared by the plaintiffs, and sent to their agents, with instructions to procure its execution.

It was executed in the presence of the plaintiffs' agent, and taken away after execution by him. He cannot recollect whether he at once sent it to the plaintiffs at Kingston; but whether he sent it or retained it, he held it whilst in his possession as the agent of the plaintiffs.

There is nothing, therefore, in evidence to shew that anything occurred at the time of the execution to prevent the instrument taking full effect, and the plaintiffs are not aided in the case by looking at the result of the transaction. Their having to resort to the covenant is a mere accident. The money was intended to be advanced on the security of the land, and for that purpose a deed, finally delivered in April, was as effectual as one delivered after Thompson's title was perfected.

The learned Chief Justice of the Common Pleas, during the argument, enquired if a person was about to leave the country for a time, and was negotiating for a loan, but not being able to complete the negotiation before leaving, requested that the mortgage should be sent to him for execution, so as to be used in the event of the negotiation being carried to a successful termination, could it be said that it was a deed until the negotiation was concluded? The latter part of the proposition furnishes, I think, the answer.

The facts would shew, without any formal declaration, that it was an escrow until the negotiations were concluded. But if in the case supposed the negotiation had been completed, and on the supposition that the title was perfect the mortgage had been executed, but it was subsequently discovered that an execution had been lodged in the sheriff's office against the mortgagor, the satisfaction or removal of which was insisted on before the advance of the mortgage money, there would be a greater similarity between the two cases, and it would seem to me that in such a case the deed must necessarily take effect at once.

The same remarks apply to the suggestion of Mr. Justice Wilson, in giving judgment on the first occasion. It is not urged that it was not competent for the company to make the stipulation, only to accept the deed provided they found everything satisfactory. What is said is, that there is no evidence of any such stipulation.

In the present case the fair inference from the evidence is, that it was expected on all sides that the title would be found satisfactory. The company would not, of course, pay over the money (or, what was the same thing in this instance, release the prior mortgages), till the title was reported to be satisfactory, but that practice, as was said in *Xenos v. Wickham*, cannot without more have the effect of converting delivery as a deed into delivery as an escrow, and of making that which would otherwise be an absolute into a conditional delivery.

It was quite competent to the plaintiffs here, on discovering that the mortgagor had no title, and on its being necessary for him to obtain a conveyance of the legal estate from the defendants, to procure a new mortgage, in which case they would have obtained the benefit of the covenant in question; but when we find them deliberately acting on the old mortgage, as evidenced by the solicitor's report, in which he states that a mortgage was executed on the 10th of April, 1855, by Henry H. Thompson, and all other parties necessary for vesting the mortgaged property in the company, I find it difficult to come to the conclusion

that it was intended to operate as an escrow, and adopting the language of Mr. Justice Smith, already quoted by the Chief Justice, think it "better to adhere to plain inferences of fact, than to attempt to remedy the inconveniences of a negligent mode of doing business, by making the facts bend to the exigencies of the negligence."

It is quite manifest that in such a case as the present, it was not in the power of the mortgagor to re-call the deed or avoid its execution. Nothing more remained to be done by him; he had done what was required of him; the deed so executed was delivered to the agent of the plaintiffs.

In the ordinary case of a deed executed, and left with the party's attorney, unless it is delivered to the attorney as an escrow, not to be delivered till the consideration money is paid, or some other condition performed, it operates as a perfect deed. If there was any condition here, what was it? Not the execution of the deed from the defendants for the fact that the title was outstanding in them does not appear to have suggested itself to anyone. So far as one can judge from the evidence, it was subsequently ascertained that the title was in the defendants, and the plaintiffs very naturally refused to complete the transaction by the release of the other mortgages until everything was cleared up.

That is, however, a very different matter from the question involved here, which is, whether the mortgagor did, after the making of the deed to him from the defendants, convey the lands mentioned in it to the plaintiffs; and being of opinion that there is no evidence to support the plea, or from which an inference to that effect can be fairly drawn, I think the verdict was wrong, and that the issue, should have been found for the defendants. I am by no means clear that if the evidence established the delivery of the deed as an escrow, it would affect the result; but it is unnecessary to offer any opinion upon that question.

I am of opinion, therefore, that this appeal should be allowed.



BLAKE, V. C.—It is alleged by the plaintiffs, the respondents, that the defendants, the appellants, by deed dated 22nd June, 1855, conveyed the premises in question to one Thompson, and that they thereby covenanted with him for quiet enjoyment, which covenant was broken, and the plaintiffs became entitled to maintain an action in respect of such breach, as, subsequently to the execution of such deed, the said Thompson conveyed the premises and the estate of him the said Thompson to the plaintiffs. The defendants say that Thompson did not, after entering into the said covenant, convey the lands to the plaintiffs. The question raised is a simple one of fact. The instrument which the plaintiffs allege to have been executed subsequent to the 22nd of June, 1855, is produced, and bears date the 10th of April, 1855. *Primâ facie* that is its date. The only other direct evidence on the point is, the certificate of the solicitor of the plaintiffs, dated the 10th of August, 1855, in which he states that this mortgage “was executed on the 10th day of April, 1855, by Henry H. Thompson and all other parties necessary for vesting the mortgaged property.”

Mr. Boulton, who witnessed the execution of both deed and mortgage, remembers but little about the transaction, and so the case virtually rests upon the mortgage, which, when produced, is shewn from its date to have been executed on the 10th of April, and on the certificate of the plaintiffs’ solicitor, who certifies to this as a fact. There is not a tittle of evidence to shew that Thompson, when he signed the mortgage and handed it to the plaintiffs, in any way qualified his delivery of it; it is clear from the certificate of their solicitor that the plaintiffs did not understand that there was any proviso or limitation at this time. Thompson, no doubt, then delivered the mortgage, trusting that the plaintiffs would satisfy the consideration to be advanced, which was £450, that was to go in discharge of two other mortgages held against Thompson by this same company.

It is true that this payment was not made until the month of August following, and that in the meantime the

plaintiffs required the execution of a conveyance from the defendants to perfect the title. But we cannot hold, in the face of the date of the mortgage, and of the certificate of the solicitor, that these circumstances qualified the execution of the mortgage, and evidence a delivery merely in escrow.

That which happened here is a matter of daily occurrence. A mortgage is delivered by the mortgagor to the company with which he is dealing, in full assurance that the money agreed to be paid will be advanced to him. It may be at the moment, in an hour, or in a day or two. The deed is then delivered, the person so delivering it not doubting but that the value to be paid will be duly received by him. I think it is impossible to say that by mere delay in carrying out the transaction, or by delay coupled with the ascertainment of some defect in the title, which necessitates the execution of some instrument to perfect the title, that which is an absolute delivery is transformed into a mere depositing of the instrument to be held as an escrow. There is no evidence here that the mortgage was so deposited, or was so accepted, and except for the finding of the Court of Queen's Bench, I would have thought there could have been no doubt on the point.

This question of fact being found against the plaintiffs, they must fail in their action, as there is no means whereby the covenant in question can, on the instruments as they stand, be carried to them from Thompson.

I think the appeal should be allowed, with costs.

*Appeal allowed (a).*

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(a) This case has been carried to the Supreme Court, where it has been argued, and stands for judgment.

## DARLING ET AL. V. MARGARET RICE.

*Married Woman—Separate estate—35 Vic. ch. 16 sec. 9.*

Declaration, on a promissory note made by the defendant, not stating that she was *feme covert*, payable to *R.* or order, and endorsed by *R.* to the plaintiffs.

Third plea, that at the time of making the note the defendant was the wife of Thomas Rice.

Replication, that the note was and is the separate engagement and contract of the defendant; on which issue was joined.

*Held*, that the plaintiffs could not recover upon proof of the note only, without shewing that it was made in respect of some employment or business in which she was engaged in her own behalf, or that she was possessed of separate estate.

*Quære*, per DRAPER, C. J. A, whether they could recover in any event, the note having been made merely for the accommodation of the defendant's son, and apparently without consideration.

*Quære*, also, whether the replication could be looked upon as a short form importing an allegation of all the alternative conditions mentioned in the statute to enable the defendant to contract.

Per BURTON, J. A., an accommodation note is not a contract which a married woman is authorized to enter into under the Act.

Per PATTERSON, J. A., the replication was not in the proper form. It should have set out the facts relied on to make the contract binding; and the defendant instead of taking issue, should have demurred or moved against it.

Appeal from the County Court of the County of Wentworth.

The plaintiffs declared upon a promissory note dated 14th May, 1875, for \$200 made by the defendant, payable three months after date to the order of T. S. Rice, and by him indorsed to the plaintiffs.

The third plea (the only one that need be noticed) was, that at the time of the making the note the defendant was the wife of Thomas Rice. To this the plaintiffs replied that the note was, and is, the separate engagement and contract of the defendant. The plaintiffs joined issue on this replication. At the trial the plaintiffs' counsel put in the note declared on, and there rested their case. The defendant's counsel thereupon moved for a nonsuit, on the ground that it must be shewn the note was given or made in respect of the wife's separate estate.

The Judge of the County Court refused to nonsuit.

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*Present.*—DRAPER, C. J. A., BURTON, PATTERSON, and MOSS, JJ. A.

The defendant was then sworn as a witness for the defence. She stated she was married in 1841: that her husband was living: that they were living together: that her husband did not consent to her giving this note: that there was no marriage contract or settlement between them; and that she was carrying on no separate business: that her son was carrying on business, and she gave the note for his accommodation: that she had some land bought by her son and given by him to her and her husband: that she had no interest in any other property, and had no household property, nor any money in savings bank or bank stock.

On this evidence a verdict was entered for the plaintiffs, with leave to the defendant to move to enter a nonsuit.

On an application subsequently made a nonsuit was ordered.

The plaintiffs appealed against the decision.

June 17, 1876. *Martin*, Q. C., for appellants.

*Bethune*, Q. C., for respondent.

September 19, 1876. DRAPER, C. J. A.—Until the passing of the Consolidated Statutes of Upper Canada ch. 73, the law in this Province undoubtedly was, as stated by Gwynne, J., in his elaborate judgment in *Merrick v. Sherwood*, 22 C. P. 467, 475: "That where goods are sold and delivered by a tradesman to a married woman upon her express promise to pay out of her separate estate, and upon the faith and credit of that estate, the vendor becomes *her* creditor, and she alone, and not her husband, the debtor; the transaction creates a *debt* due by the married woman alone, although it was enforceable in equity only, and only against the separate estate."

The Courts of Equity in England treated the married woman as a *feme sole* only in respect of property settled to her separate use; and thus it was held that not only bonds, bills, and promissory notes, but also "general engagements," such as tradesmen's bills and claims of that description, might affect her separate estate.



The husband was, I understand, joined for uniformity, but the foundation of the suit was, that the wife had separate estate or property: see *Johnson v. Gallagher*, 7 Jur., N. S. 273; *Vaughan v. Vanderstegen*, 2 Drew. 165; *Mrs. Matthewman's Case*, L. R. 3 Eq. 781; *Butler v. Cumpston*, L. R. 7 Eq. 16, and other cases cited by Gwynne, J.

The Consolidated Statute above referred to (sec. 14) enacted that every married woman having separate property, not settled by any ante-nuptial contract, shall be liable upon any separate contract made or debt incurred by her before marriage (if the marriage was since the 4th May, 1859, or after the passing of that Act), to the extent and value of such separate property in the same manner as if she were sole and unmarried. Also (sec. 18), that in any action or proceeding by or against a married woman, upon any contract made or debt incurred by her before marriage, her husband, if residing in the Province, shall be made a party, and the statement of the cause of action shall allege that such cause of action accrued before marrying, and that the married woman has separate estate, and the recovery shall be of her separate estate only. Notwithstanding any ante-nuptial contract or settlement, any separate real or personal property of a married woman acquired either before or after marriage, shall be subject to the provisions of this Act.

Then came the Act 35 Vic. ch. 16, O., the second section of which protected from liability for the debts and dispositions of the husband the wages and personal earnings of the wife, and any acquisitions therefrom, and all profits from any occupation or trade which she carried on separately from her husband, or derived from any literary, artistic, or scientific skill, all which she may hold or dispose of without her husband's consent, as if she were a *feme sole*; and the possession by a husband of any personal property of his wife shall not render the same liable to his debts. Then the ninth section, after giving her power to maintain actions in respect of her personal property, makes her liable to be sued separately from her husband, as if she were unmarried,

in respect of any of her separate debts, engagements, contracts, or torts.

The effect of the concluding portion of the ninth section I take to be, that a married woman may be sued separately from her husband, as if she were unmarried, for her separate debts, contracts, and engagements, in a suit at law, as if she were *sole*, whereas before she was only liable in equity, and in respect to a tort could only have been sued jointly with her husband. It is the procedure which is altered—the principle on which her liability rests is unaffected. That principle I take to be—that to be liable for separate debts, contracts, and engagements, the married woman must be shewn to have separate estate, especially where, as in this case, she is not living apart from her husband. For, as Turner, L. J., says, “What might affect the separate estate in the case of a married woman living separate from her husband, might not affect it in the case of a married woman living with her husband—what might bind the separate estate if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given.”

Very little notice, if any, was taken during the argument of the fact that this note was given by the defendant merely for her son's accommodation, and apparently without consideration. I allude to this now, merely to say that I rest my conclusions on grounds wholly irrespective of the question whether this might not in this case have presented another difficulty to the plaintiff's recovery.

The argument addressed to the Court was based on the latter part of section 9, already referred to. That argument appears to me to come to this, that with regard to her liability to be sued on any debt, engagement, or contract, or for any torts, a married and a single woman are on the same footing. I am not of that opinion. I think that to maintain any such suit as the present against a married woman, she must first of all make a contract or engagement, or incur a debt; next, that the liability to enforce which she is sued or proceeded against, must either have

arisen in respect of some employment or business in which she was engaged in her own behalf; or, thirdly, that she was possessed of separate estate.

Admitting that the declaration shews, *prima facie*, a good cause of action, it is met and as appears to me answered by her plea, that at the time of the making the promissory note she was the wife of Thomas Rice. The plaintiffs' reply that the promissory note stated in the declaration was and is the separate engagement and contract of the defendant; and on this the defendant joins issue.

In the ordinary sense of the words used, the replication does not mean that by reason of her being the wife, &c., she was not rendered incapable of making a promissory note, because this note was made by her in respect of some employment or business in which she was engaged on her own behalf, or in respect of her own contracts, or, that she owned separate estate. If that was what the plaintiffs intended, they have not said so. Assuming that by analogy to the case of *Dawes v. Harness*, L. R. 10 C. P. 166, this replication may be looked upon as a short form adopted for the sake of brevity, importing not only an allegation that she, though a married woman, made this note as her separate engagement and contract, but also of all the other alternative conditions mentioned in the statute to enable her to contract (which I am not to be understood as affirming), still the plaintiffs fail, because they have neither shewn that the defendant gave this note in respect of some employment or business in which she was engaged in her own behalf, or that she was possessed of separate estate.

In my opinion this appeal should be dismissed, with costs.

BURTON, J. A.—It is unnecessary to consider whether the replication in this case might have been struck out on application as embarrassing, as the parties went down to trial upon an issue joined upon it.

If the mere words of the pleadings were looked at, it would seem as if the traverse only raised the question

whether the note sued upon was the separate contract of the defendant, and I understood Mr. Martin to argue that that was the nature of the issue, and that he was entitled to succeed on the mere production of the note ; but the replication, to be a good plea, must be read as involving the allegation that the note was an engagement entered into in reference to or on the faith and credit of the separate estate of the defendant, &c., or such a contract as she is specially authorized to make under the Married Woman's Property Act of 1872.

It never could have been intended under that Act to remove all the disabilities of a married woman, and enable her to enter into any description of contract as freely as a *feme sole*, or the end might have been attained in one short enactment ; but it does, for the first time, enable her expressly to enter into certain descriptions of contract, and to sue and be sued in respect of them. It is sufficient for the disposal of this case, to say that there was no proof of any separate estate, and the note declared on was shewn to be an accommodation note, which is not a contract a married woman is authorized to enter into under the Act. I think, therefore, that the appeal should be dismissed.

PATTERSON, J. A.—The plaintiffs declare on a promissory note made by the defendant, payable to the order of her son, T. S. Rice, and indorsed to the plaintiffs.

The defendant pleads that when she made the note she was, and still is, the wife of Thomas Rice.

The plaintiffs reply, "that the promissory note in the declaration mentioned was, and still is, the separate engagement and contract of the defendant."

Issue is taken on the replication.

At the trial the defendant was examined with a view to shew that she had separate estate ; but the only evidence which appears to have been elicited indicating that she had any property at all, is noted in these words : "I have a little land bought by my son, and given to me and my husband. \* \* There are two mortgages on the pro-



perty deeded to us by John, made before the note, and still unpaid."

The defendant shewed that she made the note for the accommodation of the payee.

The evidence thus presents the case of a married woman who has no separate estate making an accommodation note.

If we were to hold her liable on this contract, we should in effect decide that there is no difference between the capacity of a married woman and that of a *feme sole* in respect of making contracts, and liability upon them.

It is impossible to hold that this result is to be deduced from a statute which could have so enacted, if such was the intention, in a very few words, but which contains no such enactment, while in section 1 it expressly provides that in one case, viz., in respect of contracts concerning her separate estate, she shall be liable. The liability of a married woman on contracts made before marriage to the extent in value of the separate property, which was created by the Consol. Stat. U. C. ch. 73 sec. 14, is left as originally enacted. If the Act of 1872 creates any liability even on contracts made in connection with any occupation or trade carried on separately from her husband, or any other matter mentioned in section 2 of the statute, it is only by implication.

The expressions relied on in secs. 8 and 9, as leading to the construction contended for, are the words in sec. 8, that the husband shall not be liable for any debts of his wife, in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts; and the provision of sec. 9, that a married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried.

The former of these provisions certainly supports the inference that the married woman was intended to have power to contract debts in connection with the matters mentioned in sec. 2; but the express mention of such debts is a reason for not reading the following general reference

to "her own contracts," as implying a power to contract without restriction, and particularly as these words can be referred to the contracts which, under sec. 1, she had power to make, or to those to which, under the former statute, she continued liable.

It is unnecessary to enter into a close examination of the statutes, or to attempt to define the extent to which a married woman may contract, or to lay down a precise rule on the subject. For the purpose of the present appeal, we have only to decide that a married woman without separate property is not liable on an accommodation note.

For the plaintiffs it was contended, that the issue taken on the replication entitled the plaintiffs to succeed on shewing that the note in question was made in fact by the defendant without the husband joining in it, and that we should now in his favour read "separate engagement and contract" literally.

I do not take that view. I consider that the replication is not in the form that should have been used in order to raise the question of liability under the statutes. If the contention was, that coverture is now no answer, the plea should have been demurred to. If what was meant was, that the contract was made under circumstances which under the statutes make it binding, the facts should have been replied on which the contention rested, in order that an issue in fact or in law might be properly raised. On both sides the pleading is reprehensible. On the plaintiffs' side by reason of the character of the replication, which, in reply to a plea, the essence of which is to shew that the defendant had not legal capacity to contract, states merely that she did contract; and on the defendant's side, for taking issue instead of moving against the replication or demurring. The case ought never to have gone to trial on these pleadings. But having been tried and the evidence given, we must read the plea, not as having the character of a tricky pleading, which the pleader now claims for it, but as intended to raise the question which was the subject of the evidence at the trial, viz., whether the defendant was

liable on this engagement as that kind of separate engagement or contract which the law now gives her capacity to make.

The appeal must be dismissed with costs.

Moss, J. A.—I am of the same opinion.

I lay no stress upon the form of the pleadings. It appears to me that if there is a defect in their frame, it is to be found in the replication; but this did not operate at the trial to interpose any obstacle to the plaintiffs' proving whatever in point of law was material to their case. If the replication is good—and the plaintiffs can scarcely expect us at this stage of the litigation to pronounce it bad, in order to give *them* an advantage—it is so, because it must be intended to allege that, although the defendant is a married woman, there were incidents connected with this contract, which rendered her liable, notwithstanding her coverture. These incidents it was for the plaintiffs to prove, and so far were they from being excluded from giving evidence of this character, that it was pointedly urged that they were bound to prove the ownership by her of separate estate. The plaintiffs contended at the trial, and renewed their contention in their reasons of appeal, and upon the argument here, that they were bound to do no more than prove the note sued upon, and that upon the true construction of the Married Woman's Act of 1872, they thus became entitled to a verdict whether the defendant had or had not separate estate. If that view be correct they are not embarrassed or prejudiced by the pleadings, for without regarding any question of form we should now hold them entitled to succeed; but if it be incorrect, and if the action be not maintainable against the married woman, unless she had separate estate, then an assertion of the existence of separate estate was necessarily involved in the replication to make it a good answer to the plea.

There are thus two questions really presented on this appeal. First, can the holder of a promissory note recover against a woman under coverture upon a promissory note

to which she became a party solely for the accommodation of another person, unless it be proved that she had separate estate? Secondly, if not, has it been found in this case that the defendant has separate estate? I entertain no doubt that both questions ought to be answered in the negative.

It was decided in cases of high authority that a married woman's capacity to contract was not enlarged by the Act of 1859. Even if she were the owner of property which came under the protection of that enactment, and was in that sense separate, she was not liable to be sued upon her contracts. The plaintiffs are, therefore, compelled to rely upon the provisions of the Act of 1872. The portion of the Act, which alone can be appealed to in their favour, is that which they have referred to in the replication, namely, the end of section 9, which enacts that a married woman may be sued or proceeded against separately from her husband in respect of her separate engagements and contracts, as if she were unmarried. I think the object of this provision was to render it unnecessary any longer to join her husband as a defendant, when a suit was brought upon any separate engagement or contract binding upon her. In my opinion it should not be construed as extending her power to contract, but as defining the procedure which may be adopted when a suit or proceeding is conducted against her upon a contract or engagement, on which she is liable. It did not make her liable upon every contract or engagement, which she made apart from her husband, but shut the door against the objection that her husband should be a party, when she or her property was sought to be made liable upon a contract or engagement which by any statute or equitable doctrine she was empowered validly to make.

I know of no statutory provision, and there certainly is no rule of equity, which could render her liable upon this gratuitous contract of suretyship, without her being the owner of separate estate. Whether she would be liable even if she were shewn to have property not settled to her own



use so as to be separate estate in equity, but coming under the Married Woman's Acts, it is not necessary to determine, because I think there was a complete failure of proof that she had any estate of either one kind or the other. The evidence does no more than establish that some land was bought by her son, and given to her and her husband. That creates a familiar estate—a tenancy by entireties—which clearly is not separate property within the meaning of the Married Woman's Acts. It would, in my judgment, be an unwarrantable straining of her language to infer from the passage cited by Mr. Martin from the examination before the trial, that she had separate property. That expression is: "I did not know that my own private property was liable for it." The only fair construction to be placed upon it is, that she was referring to what she swore in Court was her only property, namely, that held jointly with her husband.

I agree that the appeal should be dismissed, with costs.

*Appeal dismissed.*

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## COGHLAN V. THE CORPORATION OF THE CITY OF OTTAWA.

*Drains—Injury by overflow—Liability of corporation—Contributory negligence.*

The plaintiff was lessee of premises which were drained by a sewer made by the landlord in the street, with the assent of the corporation, who paid half the cost of constructing it. The corporation used it with the landlord's consent as part of the drainage system of the city, and connected it with two large drains of more than double its capacity. In consequence of the accidental bursting of a water pipe near it, a greater quantity of water was discharged into it than it could carry off, and the plaintiff's cellar was flooded and his goods damaged.

*Held*, on appeal, affirming the judgment of the County Court, that the defendants were guilty of negligence; and that the plaintiff's contributory negligence in not using sufficient exertions to save his goods, could at most only affect the quantum of damages.

APPEAL from the County Court of the County of Carleton.

This was an action on the case against the defendants.

The first count alleged that the plaintiff, being a grocer, carrying on business at the south-west corner of, and adjacent to the intersection of Bank street and Maria street, in the City of Ottawa, owned and was using a cellar under his store, which said cellar was drained by means of a drain made for and which was sufficient for that purpose; but the defendants made a drain along the west side of Bank street, and another drain along the south side of Maria street, both of which last mentioned drains they so carelessly, negligently, improperly, and wrongfully so connected with the plaintiff's drain aforesaid, whereby his cellar was drained as aforesaid, as to convey large quantities of water in and along the said drains made by the defendants and into the said drain of the plaintiff, and thereby too large a quantity of water was conveyed into the said drain of the plaintiff, wherefore the said drain of the plaintiff being insufficient for and incapable of conveying away the said additional water brought thereto by the said drains of the defendants, the same accumulated and was wrongfully and improperly penned and backed into and flooded the said cellar of the plaintiff, whereby, &c.

Second count. That the defendants, by means of a drain made by them along Maria street, and by means of another

drain made by them along Bank street, which said drains met at the intersection of the said streets with each other opposite the plaintiff's store and cellar thereunder; and by means of the said drains so dug and made by the defendants a large body of water, greatly larger than theretofore usually came to or was at that place, was conveyed and brought to the said place, adjacent to and opposite the said building and cellar of the plaintiff, and because the defendants wrongfully neglected to dig or make a sufficient outlet, drain, or other means of conveyance, whereby the said water so brought to the said place might escape and flow away from the said place, and from the said building and cellar, the said water so brought or conveyed by and through the said drains was negligently allowed and permitted by the defendants to accumulate, until the said water wrongfully flowed into and flooded the said cellar of the plaintiff and damaged and destroyed the vegetables and other goods and property of the plaintiff therein stored.

Pleas: To the first count, not guilty. 2. To the first count, that the plaintiff did not own or use a cellar under the store wherein he carried on business, nor was the said cellar drained and kept in a dry state by means of a drain made for and which was sufficient for that purpose, as alleged. 3. To the first count, that the said alleged drain was the drain of the defendants, and not of the plaintiff, as alleged. 4. To the second count, not guilty. 5. To so much of the said two counts of the declaration as allege that the defendants dug a drain along the south side of Maria street and that they connected the same with a drain on the west side of Bank street, say that they did not make or dig the said alleged drain on the south side of Maria street, nor did they connect the same with the said alleged drain on the west side of Bank street as alleged.

#### Issue.

The evidence shewed that one Quain, the plaintiff's landlord, made a drain on Maria street, in the city of Ottawa,

with the assent of the corporation, for the purpose of draining his cellar: that the corporation paid half the cost of the drain, and afterwards used it as one of the city drains; and for the purpose of so using it connected with it two other drains,—one running along Bank street and the other along Maria street: that the defendants did not dispute Quain's right to drain his cellar into the drain he made in the street; and that the plaintiff did not dispute the defendants' right to use Quain's drain as part of the drainage system of the city.

The complaint was, that the city drains were each of larger capacity than the Quain drain, in consequence of which they brought down and discharged into the Quain drain, on the occasion in question, a quantity of water which that drain had not capacity to carry off, and which, therefore, flowed through the drain into the plaintiff's cellar and caused him damage.

The case was tried at the sittings of the County Court of the County of Carleton in December, 1875. The jury found that all the drains were well constructed and properly connected: that the damage was occasioned by reason of the city drains being of larger capacity than the Quain drain; and that there was negligence on the part of the defendants in connecting the larger drains with the smaller one.

The learned Judge of the County Court having refused to disturb the verdict, the defendants appealed, on the following grounds:—

1. The drain from the plaintiff's cellar, called the Quain drain, being on a public street of the defendants, and partly paid for by the defendants when first constructed, the defendants were justified in connecting other drains therewith; and it being proved at the trial that the connection was properly made, and that the officers of the defendants were of opinion at the time such connection was so made that the Quain drain was sufficient, the defendants could not afterwards be held liable for negligence until they had knowledge or notice of some defect in the



construction of that drain, or that the same required repair.

2. That the only probable causes of the stoppage of the Quain drain shewn on the evidence were, the defective construction of that drain by the landlord of the plaintiff, and the unexpected bursting in its vicinity of a water pipe belonging to the water commissioners of the city of Ottawa, a corporation distinct from and independent of the defendants; and there was no evidence of any other cause. And that the defendants could not be held liable on the ground of negligence for any injury arising from either of these causes, without positive evidence that the defendants knew of the defect in the Quain drain, or that after the bursting of the water pipe the said drain would become defective or insufficient.

3. That the learned Judge of the County Court was wrong in holding that there was evidence from which the jury might infer that the stoppage of the Quain drain arose from the connection of other drains therewith, and that if the jury so inferred they might hold the defendants guilty of negligence.

4. That the plaintiff was guilty of contributory negligence, in this, that he had knowledge of the flooding of the cellar before any injury to his property therein occurred; and that he did not take any steps to save or remove said property, or give any notice to defendants to do so; and that the learned Judge was wrong in telling the jury that the plaintiff might excuse himself from such negligence on the ground that danger might occur to his health by such removal, there being no evidence of any such danger or of the impossibility of the defendant effecting such removal by others.

5. That the jury having found that the connecting drains with the Quain drain were properly made and connected, and that the plaintiff could by reasonable care save part of the property alleged to be destroyed, and for which action was brought, the learned Judge ought to have entered a verdict for the defendants.

The case was argued on the 19th June, 1876 (a).

Bethune, Q. C., for the appellant, cited the following cases:—*Child v. City of Boston*, 4 Allan 41; *Wilson v. City of New York*, 1 Denio 595; *Mills v. City of Brooklyn*, 32 N. Y. R. 489; *Ringland v. Corporation of the City of Toronto*, 23 C. P. 93; *Ray v. Corporation of Petrolia*, 24 C. P. 73; *Hutton v. Corporation of Windsor*, 34 U. C. R. 487; *Scroggie v. Corporation of the Town of Guelph*, 36 U. C. R. 534; *Dunn v. Birmingham Canal Navigation Co.*, L. R. 7 Q. B. 260; *Strout v. Millbridge Co.*, 45 Maine 76; *McCoy v. Danley*, 20 Penn. 86.

Ferguson, Q. C., for the respondent, cited *Rowe v. Corporation of the Township of Rochester*, 29 U. C. R. 590; *Barton v. City of Syracuse*, 36 N. Y. R. 54-58; *The Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Smith v. London and South-Western R. W. Co.*, L. R. 6 C. P. 14; *Ruck v. Williams*, 3 H. & N. 308.

September 19, 1876 (b). PATTERSON, J. A., delivered the judgment of the Court.

The first and second grounds allege reasons why the defendants should not be charged with negligence without proof of notice to them of the insufficiency, defect, or want of repair of the Quain drain. But no such thing is in question. It is not found that the Quain drain was not always as good as it had ever been, although some evidence to that effect was given, or was ever different from what the officers of the corporation always knew it to be.

The third ground raises the real question, viz., "that the learned Judge of the County Court was wrong in holding that there was evidence from which the jury might infer that the stoppage of the Quain drain arose from the connection of other drains therewith, and that if the jury so inferred, they might hold the defendants guilty of negligence."

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(a) *Present*.—DRAPER, C. J. A., BURTON, PATTERSON, and MOSS, JJ. A.

(b) *Present*.—DRAPER, C. J. A., BURTON, PATTERSON, and MOSS, JJ. A.

A good deal of apparent difficulty will be got rid of by looking at the case as it is put in the second count, where the charge is, that the defendants by means of their drains conducted water to the plaintiff's premises without providing an adequate escape for the water.

This is really the essence of the charge. How is it met? The answer attempted seems to be, that the defendants relied on the plaintiff's drain being sufficient to carry away all the water that was likely to be brought there by the two drains, which were together more than double its capacity. The jury find that this was negligence; and in my opinion, it is only a matter of words whether we say the negligence consisted in connecting two large drains with one smaller one, or in failing to provide for the escape of the water which the two drains were capable of bringing.

I agree entirely with the learned Judge in the Court below, both as to the evidence and the law.

The case of *Ruck v. Williams*, 3 H. & N. 308, which was cited by Mr. Ferguson, was not unlike the present in its facts, and was decided on a principle which sustains the plaintiff's contention. In that case the plaintiff had a sewer from his premises which was furnished with a flap or penstock at its outlet into a river, which prevented any water of the river from flowing up the sewer to plaintiff's premises. The Cheltenham Improvement Commissioners, as whose clerk the defendant was sued, made a sewer which passed the plaintiff's premises and under the river, and they removed the flap or penstock, from the plaintiff's sewer. A great storm and a flood in the river burst the new sewer, and by reason of the want of the flap which had formerly protected the plaintiff, his premises, which were lower than the summit level of the new sewer, were flooded by sewage from the new sewer, as well as by water from the river. The Commissioners were held liable. Martin, B., said, "We think that when the commissioners thought proper to make a new sewer, communicating with the plaintiff's premises from the old drain, and omitted to give him

that protection which he had before, whereby there was damage immediate and consequent upon it, that was such damage from negligence as entitled him to maintain this action." Bramwell, B., said, "As to the flap or penstock, the fact essential to be mentioned is this—the summit level or highest part of the sewer, is twelve feet higher than the level of the plaintiff's premises, and therefore it is obvious that, if the course of the sewer below the plaintiff's premises was stopped, and the water still continued to pour in from the upper part of the sewer, the plaintiff's premises must inevitably be flooded. That happened in this particular instance, because the course of the sewer was stopped by the irruption of the Chelt, and that was caused by an extraordinary storm. We call it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years : on the contrary, it would be extraordinary if it did not happen. There is a French saying, 'that there is nothing so certain as that which is unexpected.' In like manner there is nothing so certain as that something extraordinary will happen now and then. Therefore it seems to me that the commissioners, who ought to have put down a flap or penstock of a permanent character, in order to guard against a thing likely to occur, not only in a short time but at all times, may well be said to be guilty of negligence relatively to the probable event of a storm happening within fifty years."

The case before us is analogous to that just cited in this respect. The plaintiff had a drain which was sufficient to carry away the water from his cellar. The defendants connect with it two drains of more than double its capacity. They say they did not anticipate that these drains would have occasion to convey more water than the Quain drain had capacity to discharge ; they did not anticipate the extraordinary event of an unusually large amount of water, or the ordinary event that the sand and dirt carried by the larger drains might reduce the capacity of the smaller one.

There are two further grounds of appeal stated relating



to contributory negligence in the plaintiff's not using sufficient exertions to save his goods when he observed the water in his cellar. This was not pressed on the argument before us, and could not have been even plausibly urged. There is no pretence that the plaintiff in any way contributed to the backing of the water into his cellar, or to any thing which formed an essential part of his right of action. If the contention was well founded in fact, that he might, by doing anything which, in the circumstances, he could reasonably have been expected to do, have mitigated the evil caused by the defendants' negligence, and so have made his damages less, that would afford no ground for refusing him any damages at all.

The question would be only as to the amount of damages—whether the evidence entitled him to the amount of the verdict as damages which were the consequence of the wrong complained of—and that question is not raised before us.

The appeal should be dismissed, with costs.

*Appeal dismissed.*

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## OVENS V. BULL.

*Interpleader issue—Partnership property—Jus tertii.*

Partnership property cannot be seized under a *fi. fa.* against one partner, so as to interfere with the property or possession of a co-partner.

In an interpleader issue to try whether certain goods were the property of the plaintiff as against the execution creditor at the time of the delivery of the writ to the sheriff, it was proved that the goods originally belonged to W., who had mortgaged them to one D. W. afterwards became a partner of the plaintiff, and the goods part of the partnership stock-in-trade. A *fi. fa.* against W. was subsequently delivered to the sheriff, who made no actual seizure, merely taking a bond from D. for the safety of the goods. D. was not entitled to the possession of the goods so far as appeared, and the mortgage money was not due. The partnership was afterwards dissolved, when the plaintiff purchased W.'s interest in the goods, and the sheriff then seized them under the *fi. fa.*

*Held*, affirming the judgment of the County Court, that the plaintiff was entitled to succeed on shewing that the goods were partnership property at the time of the delivery of the writ to the sheriff.

*Held*, also, that the plaintiff's right could not be defeated by proving title in the mortgagee.

APPEAL from the County Court of the County of York.

This was an interpleader issue, directed for the purpose of trying whether certain goods seized on a *fi. fa.* against one White, were, at the time of the delivery of the *fi. fa.* to the sheriff, the property of the plaintiff as against the defendant, who was the execution plaintiff. It appeared that the goods had been the property of White, who had mortgaged them to one Defries, and had afterwards formed a partnership with the plaintiff, when the goods became the stock-in-trade of the partnership. There was a new mortgage given by both partners to Defries, so that in October, 1875, when the *fi. fa.* was delivered to the sheriff, the goods were the partnership property subject to the mortgage, and were in the possession of the partners with the assent of the mortgagee. It did not appear that the mortgagee had then any right of possession under his mortgage; and it did appear that the mortgage money was not due. No actual seizure of the goods was made in October so as in any way to disturb the possession, the sheriff taking a bond from Defries for the safety of the goods; and the judgment creditor arranging with the judgment debtor to accept

payment by instalments. No communication took place at that time between the sheriff and the plaintiff, who was not even aware from anything done by the sheriff that there was an execution. The partnership was dissolved on the 2nd of February, 1876, and the actual seizure took place afterwards, when the plaintiff, who had in the meantime acquired his partner's interest in the goods claimed them, and this issue was directed.

The cause was tried at the sittings of the County Court of the County of York, in May, 1875, when a verdict was entered for the plaintiff.

A rule *nisi* was granted in the following July term to shew cause why a verdict should not be entered for the defendant.

This rule was argued during the same term before his Honour Judge Boyd, and was discharged.

The defendant appealed against this decision.

The following were the defendant's reasons of appeal:—

1. That the issue being, whether the goods in question were, at the time of the delivery of the writ in the interpleader issue, and declaration in the Court below mentioned, the property of the said John Ovens, as against the said Thomas H. Bull, and the proof being that at the time of such delivery the said goods were under mortgage made by said White to one Defries, it should have been decided and so held by the Court, that the plaintiff in the Court below could not recover on said issue, and a verdict should have been entered for the defendant (the appellant.)

2. That, as at the time of the delivery of the writ aforesaid to the sheriff, the said White, the execution debtor, and the said Ovens were partners in respect of said goods, the defendant in the Court below (the appellant) should have had a verdict on said issue, and the County Court should have directed a verdict to be entered for the appellant.

The case was argued on the 18th September, 1876 (a).

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*Present.*—DRAPER, C.J.A.; BURTON, PATTERSON, and MOSS, J.J.A.

*Read*, Q. C., for the appellant, relied upon the grounds stated in the reasons of appeal. He cited *Gadsden v. Barrow*, 9 Ex. 514; *Grant v. Wilson*, 17 U. C. R. 144; *Edwards v. English*, 7 E. & B. 564; *McMaster v. Milne*, 2 P. R. 386; *Regina v. McLean*, 22 U. C. R. 443; *Bosanquet v. Woodford*, 5 Q. B. 310; *Linnit v. Chaffers*, 4 Q. B. 762.

*Reeve*, for the respondent. The writ of *fi. fa.* cannot be considered to have been in the sheriff's hands to be *executed* until the 25th February, when the sheriff proceeded to realize the moneys under the same, for although there was a formal seizure made some months previously, still the fact of his having been directed to suspend execution, and the judgment creditor having arranged with the judgment debtor to accept payment of the amount by instalments was equivalent to a withdrawal of the writ. The writ, therefore, was not in the sheriff's hands to be executed until he received instructions to proceed on the 25th February, and it could not bind the goods seized then, as the respondent had in the meantime purchased them. Moreover, the property in question could not have been seized and removed under the writ in October, as it belonged at that time to the partnership, and the judgment was against only one of the partners. He referred to *Castle v. Ruttan*, 4 C. P. 252; *Skippp v. Harwood*, 1 Vesey 239; *Hunt v. Hooper*, 12 M. & W. 664; *Davis v. Jarvis*, 2 C. P. 161.

September 28, 1876 (a). PATTERSON, J.A., delivered the judgment of the Court.

We have to confine our attention to the state of matters in October.

Nothing can turn on the existence of the mortgage. The mortgagee had not interfered with the possession of the goods; and for all that appears, the partners had a right to the possession of them as against the mortgagee. The issue here relates to the right of this plaintiff to possession, not as against the mortgagee, but as against the execution creditor of his partner.

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(a) *Present*.—DRAPER, C.J.A., BURTON, PATTERSON, and MOSS, J.J.A..



In *Rogers v. Kennay*, 9 Q. B. 592, the issue was, whether the claimant had any property in the goods as against the execution creditor, and he was held entitled to succeed on shewing that he had a lien on the goods. Some cases which appear at first sight to shew that the *jus tertii* may be set up will be found on examination to turn on the form of the issue, as *e. g. Gadsden v. Barrow*, 9 Ex. 514, where the issue was, whether the goods were the goods of the plaintiff—without saying, “as against the defendant;” but even in that case Martin, B., stated his impression that the whole question was between the claimant and the execution creditor.

It cannot be held, either on authority or principle, that an execution creditor can justify the taking of goods from one who has the possession and who has even a special property in the goods, by shewing title in a stranger. In this case, if the title of Defries, the mortgagee, could be set up, it would not be by the execution creditor, who was a stranger to Defries, but by the plaintiff, who held possession (assuming a right to possession in Defries), either as the tenant at will or bailee of Defries.

Setting aside, then, the consideration of the mortgage as irrelevant, we may test the rights of the parties by considering what would naturally have occurred if the sheriff had, in October, attempted to interfere with the plaintiff's possession of the goods. He would doubtless have been resisted by the plaintiff, on the ground that, being a partner of White, the goods could not be taken out of his possession. What would have been the sheriff's duty? It is said that on execution against one partner the sheriff must *seize* the whole, and sell the interest of the execution debtor: *Holmes v. Mentze*, 4 A. & E. 127. But what is meant by this seizure is evidently only the taking of such possession as one partner or tenant in common has jointly with his co-tenant—not an ouster of the solvent partner or any interference with his rights. In *Johnson v. Evans*, 7 M. & G. 240, the nature and effect of this seizure was considered. In that case the sheriff had seized partnership

stock in trade on a *fi. fa.* against one of two partners. He afterwards received a *fi. fa.* against both partners, and made no actual seizure under it. The partners became bankrupt, and the question was, whether the execution on the joint judgment was "served and levied by seizure upon some part of the property of the bankrupts." It was contended that the goods having been seized under the separate *fi. fa.* were also seized under the subsequent joint one; but it was held that this was not the effect of that seizure. After considering various decisions, Tindal, C. J., says (at p. 250), "So that in any way of considering the case, the seizure of the whole, which is made of necessity, leaves the property of the solvent partner, and the possession also, which follows the property in chattels, just where it was before, that is, in the solvent partner." *Mayhew v. Herrick*, 7 C. B. 229, was an action against an officer of the Palace Court by one partner for selling partnership property on an execution against the other partner alone. It was held that the officer was not liable in trover, because the sale did not pass the property as against the solvent partner, and was therefore not a conversion.

The duty of the sheriff, therefore, when informed of the partnership, was to do nothing which would interfere with the plaintiff's possession as partner; and we must assume that the claim of the plaintiff would have been in accordance with the facts, and as partner only. If the sheriff confined himself to his duty, he would have been exposed to no action and would have had no ground for interpleading. The claim of the plaintiff would in fact not have been a claim to anything which the sheriff had seized or was about to seize. The plaintiff would have been asserting a right to the possession of the goods in his character of joint owner and partner, and the sheriff would have had no right to disturb him. In that respect the goods were his property as against the execution. It would only have been by disputing the partnership that the sheriff could have been exposed to an action.

There can be no question that if the facts had been made

to appear to the Judge of the County Court, upon the application for the interpleader order, as they are shewn to us now, no order would have been granted. There was no dispute as to the rights of the parties in October, unless the partnership was disputed, and therefore nothing to contest by interpleader. *Holmes v. Mentze* is a distinct authority for this. But as the issue was granted and has been tried, we are able, by the reference which I have made to the position in October, to see in what sense the question in the issue has to be treated; and the fact of the partnership having been proved, it follows that the plaintiff has established his property as against the execution plaintiff. A decision against the plaintiff would have enabled the execution creditor to take the partnership property for his separate debt, regardless alike of the rights of the solvent partner and of the joint creditors. This decision in his favour does not prevent the sale of the interest of the execution debtor, which is all that could at any time have been sold.

The appeal must be dismissed, with costs.

*Appeal dismissed.*

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## RE McLAREN AND CHALMERS.

*Insolvent Act, 1875—Deed of composition and discharge—Joint and separate creditors—Sale en bloc.*

The insolvents, who were partners, made an assignment expressed to be in pursuance of the Insolvent Act, but attempted to limit its operation by inserting after the general description of property in the statutory form the words "of and belonging to the said co-partnership." Each of the partners had separate estate, and separate creditors. The assignee, acting under advice, only took possession of the partnership estate. Shortly afterwards James McLaren, a brother of one of the insolvents, offered to purchase the partnership estate, and upon sufficient in number and value of the joint creditors signing a deed of composition and discharge, the assignee transferred the estate to him, without any authority from the creditors, and without calling any meeting under section 49, to take the deed into consideration. At a subsequent meeting of the joint creditors, resolutions were passed approving of the deed, of the sale to McLaren, and of the action of the assignee. The dissentient joint creditors petitioned the County Judge to order the assignee to take possession of the separate estates, and to account for any loss occasioned by his omission to take possession of them, and for the value of the estate transferred to McLaren.

The learned Judge ordered the assignee to take possession of the separate estates, but did not deal with the other subjects of the petition. From this order the petitioners appealed.

*Held*, that the deed was void as to the appellants; and that it could not be supported under sec. 38, being a sale *en bloc* within the meaning of the proviso prohibiting such a sale without the previous sanction of the creditors.

*Held*, also, that the assignee was liable to account for any loss the dissentient joint creditors might sustain in consequence of such sale.

The appellants were allowed their costs of appeal; and the assignee's costs, in view of all the facts, were allowed out of the estate.

APPEAL from the County Court of the county of Carleton.

On the 10th February, 1876, the two insolvents, who were trading in partnership, made an assignment expressed to be in pursuance of the Insolvent Act; but it was attempted to limit and narrow its operation by inserting after the general description of property in the statutory form the words "of and belonging to the said co-partnership."

The official assignee was advised that the effect of this assignment was, to place in insolvency and pass to him the joint estate merely, although each of the partners had a separate estate and separate creditors. Acting on this advice, he did not take possession of the separate estates, or summon the separate creditors to attend the first meeting. At this meeting, which was held on the 4th March, he was appointed assignee by the joint creditors. This appointment was not questioned.



One James McLaren, a brother of the insolvent, had, previously to this meeting, submitted an offer for the purchase of the whole of the partnership estate at fifty cents on the dollar, of all the partnership liabilities, payable at six, twelve, eighteen, and twenty-four months; and this offer formed a subject of conversation and of interchange of opinion at the first meeting.

Shortly after the 13th March, the insolvents produced to the assignee a deed of composition and discharge, signed by a large number of the joint creditors, but by none of the separate creditors of either insolvent. These creditors were sufficient in number and represented claims large enough in amount to have made the deed of composition and discharge valid, if there had been no separate creditors.

Immediately thereafter, without any authority or direction from the creditors, without calling any meeting under section 49 to take the deed into consideration, or without submitting James McLaren's proposal to a meeting, the assignee transferred the whole of the partnership estate to James McLaren, who had endorsed the notes which were to be delivered to the creditors under the provisions of the deed. He assumed to take this course under the authority given in the 60th section of the Act. He said his object was to save the estate expense, and to free it from the danger and loss that might arise from fire.

On the 25th April, a meeting of the joint creditors was held, at which resolutions were passed approving of the deed of composition and discharge, of the sale to James McLaren, and of the action of the assignee.

The appellants were joint creditors who did not sign the deed, and opposed its assumed confirmation.

The assignee not having taken possession of the separate estates, the appellants presented a petition to the County Judge praying that he should be ordered to take possession of the separate estates, and to account to the creditors for the value of the estate transferred to James McLaren, and for any loss occasioned by his omission and neglect to take possession of the separate estates.

The learned Judge made an order simply directing the assignee to take possession of the separate estates, and not dealing with the other subjects of the petition.

From this order they appealed, on the ground that the Judge should have held the deed of composition and discharge void, and should have ordered the assignee to retake the estate transferred to James McLaren, or to account for its value.

September 19, 1876. The case was argued before Moss, J. A., sitting alone.

*Bethune*, Q. C., for the appellants.

*Kerr*, Q. C., for the respondent.

September 29, 1876. Moss, J. A.—There is no report of the grounds upon which the learned Judge proceeded in thus disposing of the application. A good deal of evidence was given to shew that the sale to James McLaren was for the full value of the estate, and it is suggested—apparently with some reason—that the learned Judge confined his order as he did, because he held that the sale to James McLaren must be supported, and that the deed of composition and discharge, which formed part of the same transaction, was binding. From the materials before me, and the statements made upon the argument, I gather that the appellants would not be disposed to object to the sale *per se*. They do not specially wish to contest the position that full value was obtained, and they deem James McLaren's indorsement ample security. But they object to being compelled to accept promissory notes under the deed, because they are apprehensive that this might be deemed an acceptance of the deed of composition, which contains a full release of the insolvents in consideration of the delivery of the notes. As they wish to rank upon, and hope to receive something from, the separate estates after the separate creditors have been satisfied, they object to being exposed to this danger. They have appealed, therefore, on the ground that the Judge should have held the deed of composition and delivery void, and should have

ordered the assignee to retake the estate transferred to James McLaren, or to account for its value.

The learned counsel for the respondent very properly abandoned the contention that the deed was valid or capable of being forced upon the appellants. Its insufficiency is too obvious to require comment. For all the purposes of this appeal it is as if it never existed. Then, what is the real position of the assignee? It is that of having sold this estate and conveyed it to the purchaser without any resolution of creditors, or any proper authority. Even if the deed of composition and discharge had been capable of confirmation by the joint creditors, and there had been no sale of the estate, it was the duty of the assignee to have awaited that confirmation before re-conveying to the insolvents.

The 49th and succeeding sections plainly contemplates a decision of the creditors at a meeting called for the very object of considering the terms of the proposed composition. Full and minute directions are given for affording all creditors an opportunity of attending this meeting, and for previously furnishing them with information.

By section 49 this meeting is made as necessary in the case of a deed, as in the cases of an offer by the insolvent to compound or a consent to his discharge.

The intention of the Legislature was, that before a minority were compelled to accept a certain composition, they should have an opportunity of explaining their views, and of bringing before the general body of creditors their reasons in opposition to the acceptance of the composition. Until the deed has been submitted to such a meeting, it is only a "proposed composition and discharge."

It was, however, argued that this sale might have been made by the assignee in virtue of the general powers conferred upon him by his office, and without any express authority.

Wide powers are possessed by the assignee for winding up the estate. The 38th section gives him all the rights and powers of the insolvent in reference to his property

and estate. He is directed to wind up the estate by the sale, in the ordinary mode in which such sales are made, of all bank or other stocks, and of all movable property, by the collection of all debts or by the sale of the estate of the insolvent, or any part thereof, if such be found more advantageous, at such price and on such terms as to the payment thereof, as may seem most advantageous. This language is very extensive, and might in terms seem to cover this sale. But I think it clear that this case falls within the proviso prohibiting a sale *en bloc*, without the *previous* sanction of the creditors.

It was contended that this was not to be treated as a sale of that description, because only a part of the whole estate conveyed by the assignment was dealt with, inasmuch as the insolvent estate consisted of the joint estate and the two separate estates, and only the former was sold. This contention is wholly untenable. It could not be contemplated that under any circumstances a sale *en bloc* of a partnership estate and of the separate estates could be made. It would be impossible after such a sale to adjust the rights of joint and separate creditors. For this purpose the price realized by each estate must be distinct.

In strictness, therefore, the assignee stands in no better position than if he had wrongfully converted this estate, and he is under an immediate liability to account for its value. But it would be exceedingly harsh to apply such a severe rule under the actual circumstances. There is not the slightest reason for suspecting his entire good faith. He acted under advice, and, so far as I can see, with an honest desire to discharge his duty. The advice being erroneous, and his proceedings being unwarranted by law, he must make amends to any one who is damaged.

But in view of the facts to which I have referred, the requirements of justice will be amply satisfied by making him account only to the dissentient joint creditors, and only when some loss has occurred.

Considering the large number of creditors who are satisfied with his action, it would be quite out of the question



to order him to account immediately for the value of the transferred estate. As already intimated, the appellants do not so much object to the sale, as to their exposure to the danger of exclusion from participating in the surplus of the separate estates, on the plea that they had released the insolvents.

I do not think that they should be forced to run any risk of the kind. It may be that they could guard themselves against any such construction being placed upon their acceptance of promissory notes, similar to those delivered to the assenting creditors ; but it is impossible now to determine this question. That they sincerely feel such apprehension I am not at liberty to doubt, and as I cannot relieve them from it upon this appeal, I ought not to assist in keeping them in a position in which it may be realized. They have done nothing to disentitle them to their strict rights. It was not their fault that the proceedings were not regular and according to law. Consequently they have every claim to protection against the raising of doubts and difficulties, which may result to their prejudice.

The appellants' counsel, indeed, did not press for an order that the assignee should account at once. He conceded that it would be highly inconvenient, if not impracticable, to enter upon that enquiry until the separate estate was realized ; but he argued that if the order were allowed to stand in its present shape, it might afterwards be used as conclusive proof that the Judge had decided adversely to the appellants the other matters to which their petition related. He contended, in effect, that reading the petition and order together it might be subsequently asserted that the validity of the deed of composition and discharge, and of the sale and the accountability of the assignee, were *res judicata*. This view is entitled to consideration. The appellants had presented these questions for adjudication, the Judge had jurisdiction over them, and the silence of his order might be construed as an adverse determination.

I incline to think that this would be the result, but the point does not come up in such a way as to admit of an

adjudication. I do not think it would be just to leave the appellants in any peril upon this matter.

I therefore determine that the order appealed from should be varied, by declaring that the deed of composition and discharge is not valid as against the appellants, and that the sale is not binding upon them: that the assignee is liable to account to the appellants for any loss or damage they may sustain in consequence of such sale; and that the appellants shall be at liberty to apply to the County Judge for an order directing the amount of such liability to be ascertained, as occasion may require. I do not think that in the actual result it will be necessary for the appellants to apply for such an order from the County Judge. All that they seek will be gained if the notes are paid, and they are permitted to rank upon the separate estates.

The assignee can receive payment of the notes, and hand the amounts to the appellants as *quasi* dividends from the estate. When the separate estates are realized, and the appellants have been paid everything that may be coming to them out of the surplus, they can safely accept the notes still to mature.

I have made these last observations at the request of the parties that I should indicate my views, as that might tend to prevent further litigation, and on the assumption that the appellants do not desire to dispute that the sale was for a sufficient price.

I think that the appellants are entitled to their costs of this appeal, and, in view of all the facts, that the assignee should be allowed his costs out of the estate,

*Appeal allowed.*

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## KALUS V. HERGERT.

*Insolvency—Fraudulent preference—Fresh advance—Insolvent Act of 1875.*

An assignment of the whole of a debtor's estate to secure a pre-existing debt is valid where a further advance is made, and there is a *bona fide* expectation and intention that the business of the debtor will be carried on.

The insolvent gave one of his creditors a chattel mortgage upon the whole of his stock then in, or which at any time during its continuance might be in his store, for an existing debt and a fresh advance; but the evidence set out below shewed that the advance was not made with the *bona fide* belief and intention that the business would be carried on through the relief afforded.

*Held*, that the mortgage was fraudulent, and could not be supported even for the further advance.

THIS was an appeal by Albert Smith, from a decision of the Judge of the County Court of Middlesex, sitting in Insolvency. The learned Judge dismissed the petition presented by Smith under the 125th section of the Insolvent Act of 1875, praying that the assignee might be ordered to restore possession of certain goods to which Smith claimed to be entitled as mortgagee.

The insolvent Hergert carried on business as a tobacconist in London, from November, 1875, until the 18th of April, 1876, when his estate was placed in compulsory liquidation. He had no means, but commenced on a borrowed capital of small amount.

He had dealings from the outset with Smith, who seems to have been on terms of intimacy with him. Thus he said in his examination: Mr. Smith would "be able, from his knowledge of my affairs, pretty much to know how my standing was, but he would not know it within \$100 or \$200. I refer to the commencement of my business."

On the 4th of April, 1876, he was indebted to Smith in the sum of \$123, and Smith was endorser for him upon a promissory note for \$100, which seemed to have then matured. He was indebted to other persons to an extent at least treble the value of his estate. He had been sued in January for \$150 which he owed, and this action was pending, a fact with which Smith was acquainted. He said that his assets were worth \$600. When realized they produced \$454.

On the 5th of April he executed a chattel mortgage to Smith upon all the stock-in-trade then in, or which at any time during its continuance might be in, his store. This instrument purported to secure payment of four promissory notes dated 4th April, amounting in the aggregate to \$400, one being for \$150, at ten days; the second for \$80, at one month; the third for \$88.33, at two months, and the fourth for \$81.67, at three months.

In his petition and affidavit, Smith stated that on the 4th April Hergert applied to him for the loan of a certain sum of money for the purpose of paying freight and duty upon certain goods, and also to pay or partly pay a promissory note, which amount he refused to advance, but afterwards consented on condition that Hergert should make the four promissory notes and execute the chattel mortgage.

The first of the notes not being met, Smith, on the 18th April, took possession under the chattel mortgage. Later on the same day a writ of attachment was issued in pursuance of the Act.

September 19, 1876. The case was argued before Moss, J. A., sitting alone.

*Bethune, Q. C.*, for the appellant. A present advance takes the case out of the statute: *Philps v. Hornstedt*, L. R. 8 Exch. 27, L. R. 1 Exch. D. 63; *Churcher v. Johnston*, 34 U. C. R. 528; *Hutton v. Cruttwell*, 1 E. & B. 15; *Ex parte Winder*, 1 Chy. D. 290. *Smith v. Cannan*, 2 E. & B. 35, and *Re Lilburne*, 12 L. T. R. N. S. 209, were cases of pre-existing debts, and do not apply here. The learned Judge must have acted on sec. 3, sub-sec. j. There was a provision in the old Act similar to this, and the old cases are therefore still applicable. Sub-section j. must be read in connection with secs. 130-3, and they shew that the element of fraud must be imported into sub-section j, before the transaction can be declared void. Here the present advance rebuts the presumption of fraud: *Newton v. Ontario Bank*, 15 Gr. 283. The



evidence shews that the defendant thought he could tide over his difficulties if he got the present advance. Smith should at least be allowed priority to the extent of \$177, the amount actually advanced. Section 131 plainly contemplates such relief. He also cited *Matthers v. Lynch*, 28 U. C. R. 354; *Allan v. Clarkson*, 17 Gr. 570; *Ex parte Topham*, L. R. 8 Chy. 619.

*Bartram*, for the respondent, contra. Smith was intimately acquainted with the defendant's business, and must have known that he could not do much with \$177, which was all that was available out of the \$400. The evidence also shews that he would not have consented to any one else making the loan. A present advance only takes the case out of the statute, when it is made with the *bonâ fide* expectation that the business will be carried on. He cited *Ex parte Keen*, L. R. 2 Chy. D. 256; *Ex parte Fisher*, L. R. 7 Chy. App. 636; *Royal Canadian Bank v. Matheson*, 6 L. J. N. S. 9; *Squire v. Watt*, 29 U. C. R. 328; *Thorne v. Torrance*, 18 C. P. 29; *In re Hurst*, 12 U. C. L. J. N. S. 205.

September 30, 1876. Moss, J. A.—I must remark upon the appellant's affidavit, which is echoed by the insolvent, that it betrays a want of candour on his part to suppress all mention of the circumstance, which was afterwards developed in the cross-examination, that the note there anonymously referred to was endorsed by Smith, and that it was part of the arrangement that this note should be retired out of the money to be advanced. A perusal of the petition and affidavit would lead one to suppose that Smith when he took the chattel mortgage had only \$123 in peril, and that Hergert was free to deal with the \$277.

It is argued that the learned Judge erred in law, because, it is said, he decided against the appellant on the ground that the fact of Smith taking a mortgage upon the entire stock-in-trade, and even upon stock which might subsequently be received, shews that he thought Hergert's circumstances were most precarious: that the enforcement of such a security must necessarily stop his trade, and defeat

and delay creditors ; and that accordingly the case was governed by *Smith v. Cannan*, 2 E. & B. 35 ; *Re Lilburne*, 12 L. T. N. S. 209, and that class of decisions. From the short note of the judgment it is not clear that the learned Judge proceeded solely upon that ground, although he certainly does lay stress upon these cases, and does not expressly rest his decision upon the principles which in my judgment are applicable.

Mr. Bethune pointed out the distinction between the cases referred to by the learned Judge and the present case. In those the Court was dealing with transactions where a pre-existing debt formed the whole consideration ; in this there was an additional advance. Where the assignment is of the whole of the debtor's property, the ingredient of a further advance is most material, and the authorities in cases where the security was for a pre-existing debt only, are not in point. But whether this distinction was or was not at the moment present to the mind of the learned County Judge is not of consequence, for I am of opinion that the conclusion at which he arrived was perfectly correct.

The English authorities relied on by the appellant have, I think, established the doctrine that while an assignment of the whole of a debtor's estate to secure a pre-existing debt cannot stand, whatever may have been the motives that led to it, a similar assignment is valid where a further advance is made, and there is a *bonâ fide* expectation and intention that the business of the debtor will be carried on.

The cases upon this subject are very numerous, but I propose to refer to a few only.

In *Bittlestone v. Cooke*, 6 E. & B. 296, Lord Campbell said that if a conveyance of the whole of a debtor's property, present and future, were made with a view to obtain advances for the purpose of carrying on the trade, it was not an act of bankruptcy.

In *Pennell v. Reynolds*, 11 C. B. N. S. 709, Willes, J., who delivered the judgment of the Court, said : " In our judgment a present substantial advance of money puts the

transaction upon the same footing as an assignment with a substantial exception of part of the property. It is not necessarily an act of bankruptcy. The advance may be the means of enabling the assignor to go on with his trade, and so the transaction may be beneficial for the creditors."

In *Lomax v. Buxton*, L. R. 6 C. P. 112, the same very learned Judge remarked, "So where the conveyance is of the whole property not merely for an antecedent debt, but also for a present advance of which the debtor really has the advantage, and which he can apply to the purchase of stock or otherwise for his use, the transaction is considered on the same footing as if there were a substantial exception out of the debtor's property, and therefore not necessarily and *per se* an act of bankruptcy."

The authorities were reviewed by Sir George Mellish, L. J., in *Ex parte Fisher*, L. R. 7 Ch. 636, and their result stated to be, that an assignment by a debtor of all his effects partly as a security for a substantial fresh advance, is not necessarily an act of bankruptcy. This case also establishes that while, as a matter of law, the smallness of the amount of the advance does not necessarily make the assignment an act of bankruptcy, it affords strong evidence that the principal object of the parties in the whole transaction was, not to enable the debtor to continue his trade, but to secure the past debt. *Ex parte Winder*, 1 Ch. D. 290; *Ex parte King*, L. R. 2, Ch. D. 256, and *Philps v. Hornstedt*, L. R. 8 Ex. 27, and L. R. 1 Ex. Div. 62, are to the same effect. They all shew that the crucial test is, the existence of a *bonâ fide* intention to carry on the business,

Assuming that these cases may be, as they have been, appealed to in behalf of the appellant, notwithstanding the wide language of sec. 3, sub-sec. j., I am of opinion that the rule deducible from them does not protect this transaction. The evidence satisfies me that it was not entered into with the *bonâ fide* expectation and intention that the business would be carried on through the relief afforded by the fresh advance, but that, on the contrary, it was a mere device to enable Smith to receive payment in full. The amount of the advance was really \$177.

Smith was acquainted with the position in which the business of his debtor stood. He knew that he was being sued, and that the whole of the advance would not suffice to satisfy the judgment which the pressing creditor might recover. He knew that there were no other means out of which other creditors could be even partially satisfied, and thus induced to grant a respite. He knew that his debtor could not, out of the whole of the ordinary sales of his business, receive the \$150 which would be payable in thirteen days. He knew, therefore, that the enforcement of his security would very soon bring the business to an end. That he intended to enforce it, is perhaps best shewn by his subsequent conduct, for he seized under it, and placed a bailiff in possession on the earliest possible day. Knowing as he did all the circumstances, I cannot conceive it to be possible that he believed or even hoped that an advance of \$177 would enable his debtor to carry on his business. He asserts that he did not look at the ordinary incomings of the business, but that he believed the representation of the insolvent, that this advance would enable him to obtain a considerable quantity of goods from Lamb & Cross, merchants, with whom he was dealing.

The learned Judge seems to have thought that what Smith expected was, not that the receipt of these goods would enable the debtor to carry on his regular business, but that this accession to the debtor's property would enable him without fail to realize upon his security. As the learned Judge significantly remarks, fortunately for Lamb & Cross, they were enabled to stop these goods *in transitu*. Smith's own notion of the probable effect of the mortgage upon the claims of other creditors, is indicated not obscurely in a passage in his cross-examination, where he says: "If any one else had taken a mortgage, the chance of my getting anything would have been very poor, the way things have turned out." He has certainly shewn no reasons that could have led a man of ordinary sagacity or intelligence to expect that things *would* turn out otherwise.

I shall only refer to one other piece of evidence of a most



condemnatory character. Kalus, the creditor who afterwards issued the attachment, had been pressing Hergert for a settlement, and I have no doubt upon the evidence that Smith was cognizant of this fact. Two or three days after getting the chattel mortgage, as Kalus swears, Smith told him that he would not get a cent now from Hergert, because he, Smith, had got a chattel mortgage.

This statement was not contradicted by Smith, although he was re-called after it was made, and its importance was sufficiently obvious. I must infer that it passed unchallenged, simply because contradiction was impossible. It is difficult for him to contend in face of this statement, that he entered into the transaction in the honest belief that the business could be carried on, and that all the creditors might thus receive a benefit as the result of his advance.

It was suggested that if the mortgage was not supported *in toto*, it might stand for the \$177. I cannot grant even this qualified relief. It is contrary to the general rule of law, and the 131st section of the Act cannot assist the appellant, if for no other reason, because he knew that Hergert was wholly unable to meet his liabilities.

The appeal is dismissed, with costs.

*Appeal dismissed.*

## GILLELAND ET AL. V. WADSWORTH ET AL.

*Mortgagor and mortgagee—Assignment—Notice—Payments on mortgage—Registration.*

B. being the owner of lot A, mortgaged the same to C., who assigned the security to J., covenanting for the payment of the mortgage money, which assignment was duly registered. Afterwards B. agreed with W., the owner of lot B, to exchange properties, B. undertaking to have his mortgage to C. transferred from lot A to lot B, to which C. assented, not informing either of them of the assignment. C., who was a solicitor, was employed by both parties to prepare the several conveyances, including the mortgage from B. to himself on the newly acquired property. No mention was made or production demanded of the first mortgage, which remained undischarged. B. paid off and obtained from C. a discharge of the new mortgage given by him on lot B; and C. paid the interest to J. for several years, when he made default, and the plaintiffs, the representatives of J., then applied to B., when he, for the first time, was made aware of the assignment.

*Held*, reversing the decision of the Chancellor, that the payments so made by B. to C. had not the effect of discharging the mortgage on lot A, and that the plaintiffs were entitled to a foreclosure.

*Held*, also, that W. was affected with notice of the assignment by reason of the registration; and with constructive notice, by his omission to make any enquiries for the mortgage.

*Held*, also, that it was not necessary to set up the registration of the assignment in the bill in order to prove notice; and that, if necessary, an amendment should have been allowed under the A. J. Act, 1873, sec. 50.

APPEAL from a decree of the Chancellor dismissing a bill for the foreclosure of a mortgage, reported in 23 Grant 547. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The following were the appellants' reasons of appeal.

The appellants submit that the decree of the Court of Chancery, declaring the appellants' mortgage satisfied as against the defendants and dismissing the plaintiffs' bill, is erroneous and ought to be reversed, and that the ordinary mortgage decree ought to have been made in favour of the appellants, for the following, among other, reasons:

1. Because the defence of payment set up in the answer was not proved.

2. Because it was not competent to the defendants, having regard to the terms of the answer, to make the defence relied upon, and to which effect was given, namely: that a

new mortgage had been given to the original mortgagee in lieu of the mortgage in question, and that such new mortgage had been given and had afterwards been paid off in ignorance of the assignment to the plaintiffs.

3. Because justice required that if such a defence were allowed, the plaintiffs should have been allowed (but were not) to meet it by amending their bill if necessary, and proving, as the fact is, that the assignment of the plaintiffs' mortgage was duly registered in the proper registry office.

4. Because by the registration of the assignment to Junkin both Brown and Wadsworth had notice thereof, and Junkin was protected by the registry laws against any subsequent dealing with the property by Currie, and the transaction in question was and is fraudulent and void against the plaintiffs by virtue of the registry laws.

5. Because Brown and Wadsworth, having employed Currie as their solicitor in the preparation of the new mortgage, were informed by him of the assignment to Junkin, or must be presumed to have been so informed, or at all events are bound and affected in equity by and with the knowledge which Currie possessed.

6. Because to have informed Brown and Wadsworth of the assignment would not have been a disclosure of his own fraud by Currie, and unless it would, the disclosure must be presumed.

7. Because Brown and Wadsworth were guilty of gross and wilful negligence in not requiring production of the plaintiffs' mortgage or a re-conveyance of the mortgaged premises, or the execution and registration of a discharge thereof, and in not searching the register; but for which gross and wilful negligence they would have obtained actual knowledge of the assignment to Junkin.

8. Because the defendants ought to suffer rather than the plaintiffs; Brown and Wadsworth having placed confidence in Currie, which Junkin did not do, but took his covenant.

9. The appellants rely upon the following authorities: The Registry Act of 1867-8, secs. 64, 65, 66, 67, and 68; *Hewitt v. Loosemore*, 9 Ha. 449, 455-6; *Atterbury v. Wallis*,

8 DeG., M. & G. 454, 463, 4 *et seq.*; *Kennedy v. Green*, 3 M. & K. 699 : *Rolland v. Hart*, L. R. 6 Ch. 678.

The respondents' reasons against the appeal were

1. The decree of the Chancellor is correct for the reasons stated in the judgment.

2. The objection was taken at the hearing to the defence, and was relied on and referred to in the second ground of appellants' reasons of appeal, and such objection, if of any importance, should not now be given effect to. Under the answer of the infant defendants, according to the practice of the Court of Equity, any defence can be relied on. The plaintiff was not taken by surprise. The defence is practically the same as that pleaded.

3. The plaintiff has not pleaded the registry laws, and therefore cannot avail himself thereof if otherwise applicable. No application to amend by pleading the registry laws was made until after the evidence was taken and the argument closed. The Chancellor having refused liberty to amend by pleading the registry laws, this Court should not interfere with the exercise of his discretion.

4. It was not proved and does not appear that the title to the premises is a registered title.

5. Payment or satisfaction to a mortgagee, without notice of an assignment of the mortgage, is a good payment : *Engerson v. Smith*, 9 Gr. 16.

6. Brown was not bound to search the register, and would not have been affected with notice of the assignment by virtue of the registry of the assignment, and if Brown had not parted with the premises to Wadsworth, but had retained them and satisfied the mortgage money to Currie without notice of the assignment to plaintiff, the plaintiff could not have recovered against him even if he had pleaded the registry laws, and had proved the title to be a registered one : *Williams v. Sorrell*, 4 Ves. 389.

In this case Brown agreed to pay off the mortgage or to have it released from the premises Wadsworth was getting in exchange. As between Brown and the plaintiff, Brown satisfied the mortgage by executing and paying the amount



secured by the mortgage on the exchanged property without notice of the assignment. If Brown has a valid defence, Wadsworth should stand in his position. The plaintiff could not recover in an action against Brown on the covenant in his mortgage, because Brown could plead payment, and the registry laws would not affect him with notice. The land is merely a security for the debt of Brown, and if the debt as against Brown is satisfied by payment, the land is discharged.

If the payment by Brown is not a discharge of the mortgage, then Wadsworth should have recourse over against Brown, but he could not recover, as Brown could plead payment, as between himself and plaintiff.

7. Currie was guilty of a fraud in the transaction in question, and therefore notice of the assignment cannot be imputed. Had Currie notified Wadsworth and Brown of the assignment of the mortgage, then Brown would not have executed a new mortgage to Currie. Currie was personally interested in concealing the fact of the assignment in order to obtain the new mortgage. Notice under such circumstances cannot be imputed: *Waldy v. Gray*, L. R. 20 Eq. 238-252; *Kennedy v. Green*, 3 M. & K. 699.

The case of *Hewitt v. Loosemore*, 9 Ha. 449; *Atterbury v. Wallis*, 8 DeG. M. & G. 454; and *Rolland v. Hart*, L. R. 6 Ch. 678, cited by the appellants, are distinguishable from the present.

In these cases there was no interest on the part of the solicitor to conceal the knowledge of the instruments, notice of which were imputed to the client. The solicitor obtained no benefit from the concealment, and the fraud was only in the concealment.

As put by Lord Hatherley, in *Rolland v. Hart*, L. R. 6 Ch., at p. 682, in pointing out the distinction between *Atterbury v. Wallis* and *Kennedy v. Green*: "It must be made out that distinct fraud was intended in the very transaction so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him."

Here it is clear fraud was intended by Currie.

The case was argued on 21st December, 1876 (a.)

*MacLennan*, Q. C., for the appellants. The plaintiffs should have been allowed to amend their bill by setting up the registration of the assignment of the plaintiffs' mortgage, for the purpose of proving that both Brown and Wadsworth had notice thereof. But even if the assignment had not been registered, Brown and Wadsworth had notice through their solicitor. *Boursot v. Savage*, L. R. 2 Eq. 134, shews that a knowledge of everything the solicitor knows will be imputed to the client, except a fraud in which the solicitor is concerned; but there was no evidence of any fraud in the assignment of the mortgage, and the Court must assume that Currie communicated it to the parties, and that they trusted to him to get it back. Moreover, Brown and Wadsworth were guilty of gross negligence in making no enquiry for the mortgage. In addition to the cases cited in the reasons against the appeal, he referred to *Browne* on Frauds, 196.

*Boyd*, Q. C., and *W. G. P. Cassels*, for the respondents. The evidence shews that a fraud was clearly intended. Currie was personally interested in concealing the assignment, and therefore his clients cannot be held to have had constructive notice of it: *Waldy v. Gray*, L. R. 20 Eq. 238; *Kennedy v. Green*, 3 M. & K. 699. The cases of *Hewitt v. Loosemoore*, 9 Ha. 449; *Atterbury v. Wallis*, 8 DeG. M. & G. 454; and *Rolland v. Hart*, L. R. 6 Ch. 678, are distinguishable from the present, as in those cases the solicitor did not derive any personal benefit from the concealment of the instrument—the knowledge of which was imputed to the client. It is well settled that a mortgagor has a right to deal with a mortgagee until he has received notice of assignment, and that he is not affected with notice by the registration thereof: *Engerson v. Smith*, 9 Gr. 16; *Williams v. Sorrell*, 4 Ves. 389; *Stocks v. Dobson*, 8 DeG. M. & G. 117; *Beck v. Moffatt*, 17 Gr. 602; *Trust and Loan Co. v. Shaw*, 16 Gr. 448. And in this case, Brown satisfied the

first mortgage by paying the amount secured by the mortgage on the exchanged property, before he had any notice of the assignment, so that he has a good defence—and Wadsworth is entitled to stand in his position. The land was merely a security for Brown's debt, and the debt as against Brown having been paid, Wadsworth has a right to insist that the first mortgage is extinguished: *Walker v. Jones*, L. R. 1 P. C. 50. As to Wadsworth's negligence in not asking for the mortgage, *Agra Bank v. Barry*, L. R. 7 H. L. 139, shews that there must be a wilful negligence in not making any enquiry for title deeds from a fear of the consequences; but there was no such evidence here, as it has been proved that he omitted to enquire owing to his confidence in Currie. Junkin was, however, guilty of wilful negligence in not notifying Brown of the assignment, which he neglected to do because he relied on Currie's covenant.

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February 20th. 1877 (a). Moss, J.A.—This is an appeal from a decree of his Lordship the Chancellor, dismissing the bill with costs.

The suit was instituted by the personal representatives of John Junkin, against the widow and heirs-at-law of Daniel Wadsworth, for the foreclosure of a mortgage.

As arguments were addressed to us founded on the form of the pleadings, it will be convenient to briefly describe their character. The bill follows the ordinary form in a case where an assignee of a mortgage seeks foreclosure against a person to whom the equity of redemption has been conveyed.

It alleges that under a mortgage made by Joseph W. J. Brown, on 26th September, 1862, to James G. Currie, and an assignment from Currie to Junkin on the 3rd November, 1862, Junkin became the mortgagee of a certain freehold

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(a) *Present*.—BURTON, PATTERSON, and MOSS, JJ.A., BLAKE, V.C.

estate, (which may be designated as lot A.): that Brown, on 7th December, 1863, conveyed his equity of redemption to Wadsworth: that Wadsworth afterwards died intestate, leaving the defendants, his widow and co-heirs, two of whom are infants: that Junkin died on 6th March, 1868, and the plaintiffs are his duly appointed personal representatives; and that no payment was made on account of principal, but that interest had been paid up to 1st October, 1874. There is no averment that the assignment was registered, although in fact it was, or that either Brown or Wadsworth had notice of its existence.

The adult defendants by their answer set up that before Wadsworth became the owner of lot A., and after the transfer of the mortgage to Junkin, Brown, without having notice of such transfer, in good faith paid the whole of the mortgage money to Currie, and that in equity such payment is a satisfaction.

The infant defendants, by their guardian *ad litem*, alleged that Brown paid Currie all the principal and interest secured by the mortgage, and that nothing remained due thereon, and that if the payments by Brown were made after the assignment, they were made without any notice of the assignment to Brown or to Wadsworth.

The ordinary replication was filed.

There is no controversy between the parties as to the facts established by the evidence. It appeared that Wadsworth was the owner of another property, which may be designated as lot B. It was about the same value as lot A., and was unincumbered. A bargain was made between Brown and Wadsworth for an even exchange of these properties, Brown undertaking to get the mortgage on lot A. discharged, so that Wadsworth should have a clear title. They went together to Currie, whom they both supposed to be still the holder of this mortgage, in order to procure his consent to discharge the mortgage upon lot A., and to accept instead a mortgage from Brown upon lot B. for the same amount and in the same terms. Currie, without informing either of them of the assignment, assented



to this proposal, and being a solicitor, he was employed by each of them to prepare the necessary documents. He was not instructed to search the title, each of the parties being satisfied that the other had a good title. If the mortgage had still belonged to Currie, as was supposed, the instruments to be executed would have been a conveyance from Brown to Wadsworth of lot A., a conveyance from Wadsworth to Brown of lot B., a mortgage by Brown to Currie on lot B., and a discharge by Currie of the mortgage on lot A. The two conveyances and the mortgage on lot B. were executed; but Currie did not assume to execute any discharge of the mortgage on lot A. The mortgage deed was then in the possession of Junkin, and the assignment had been registered long previously.

Neither of the parties made any enquiry for this mortgage deed or demanded its production. Currie had for five years been Wadsworth's solicitor, and transacted all his legal business. Both he and Brown reposed the utmost confidence in Mr. Currie, and relied upon his doing or procuring all that was requisite to give effect to their agreement. Mrs. Wadsworth swore that they "left it all to Mr. Currie to transact the business." Brown proved that they each paid one half of Mr. Currie's charges for his services: that they "left it to Mr. Currie to make all the papers of exchange correct"; and that they "had every confidence in him." The two conveyances and the mortgage were duly registered. Wadsworth lived until July, 1871, but he does not appear to have ever asked Mr. Currie for the mortgage.

Supposing, as he did, that it had been discharged in the usual way, it is probable that he never thought of the propriety of having possession of the instrument itself. Brown, not having received any notice from Junkin, and also believing that the old mortgage had been discharged, paid the new mortgage before it became due, and some time afterwards obtained a regular discharge from Mr. Currie.

The assignment from Currie to Junkin contained a covenant by the former for the payment of the mortgage money, and under this he continued to pay the interest

until October, 1874. Mr. Currie having made default in payment of the instalment falling due in 1875, the plaintiffs applied to Brown, who then for the first time became aware of the existence of the assignment.

It is proved that the plaintiffs' practice was to take the mortgage to Mr. Currie, and upon a payment of interest being made to endorse a receipt upon the mortgage.

It seems to be clear that the question for adjudication is, whether the law will impute notice of the assignment. If neither Brown nor Wadsworth is chargeable with notice, I think that the giving of the mortgage on lot B. may well be treated as a satisfaction of the original mortgage. The essence of the transaction would be that Brown, without notice of any assignment, applied to his mortgagee to accept something else in lieu of the mortgage.

I see no reason why this should not fall within the rule which protects payments made to the mortgagee by the mortgagor before he has any notice of the transfer.

It was, indeed, argued that that rule is only applicable where the payment is made in accordance with the terms of the mortgage itself. But this argument is met by the decision of the Lords Justices in *Stocks v. Dobson*, 4 DeG. M. & G. 11. Sir George Turner said: "Thus the case stands considered as a question of payment. Is there, then, any distinction between actual payment and a *bonâ fide* settlement of accounts between a debtor and his creditor without notice of any assignment? I see no substantial ground of distinction between actual payment and a release to the debtor founded upon a fair and *bonâ fide* arrangement. I take the true question to be, whether there is evidence of there having been a fair and *bonâ fide* arrangement between the debtor and the only creditor of whose title the debtor had notice."

But suppose that Brown was not, and that Wadsworth was, in the eye of a Court of equity affected with notice, what would be the position?

According to the rule laid down in *Stocks v. Dobson*, 4 DeG.

M. & G. 11; Brown might insist, if it were in any way material to his interests, that the first mortgage was extinguished; but would Wadsworth have the same right? I think not. If notice that the mortgage then belonged to Junkin is to be attributed to him, it follows that he must be taken to have known that *he* was the person who must discharge the mortgage, and that he must have trusted to Currie to procure the discharge. He could not afterwards be permitted to say that he dealt on the faith of what was done being a discharge of the mortgage. It would have been not any neglect of duty on the part of Junkin, but his own carelessness or complete reliance upon Currie, that caused him any prejudice.

Now, I think, there can be no doubt that if Junkin is entitled to rely upon the fact that he had registered his assignment, notice must be attributed to Wadsworth.

The registration of the assignment would not be notice to Brown, because a mortgagor paying off his mortgage does not come within the class of persons to whom registration constitutes notice. But Wadsworth was expressly within the terms of the statute, for he was a person claiming an interest in the land subsequent to the registry of the assignment. He became a purchaser of this land while an assignment of the mortgage stood registered.

In *Trust and Loan Co. v. Shaw*, 16 Gr. 448, the present Chancellor remarked: "I think that the statute proceeds upon this, that a party acquiring land ought to see whether there is anything registered against that which he is about to acquire; and that he is to be assumed to search the registry for that purpose; but this does not apply to one who is not acquiring, but parting with an interest in lands." While this latter part of the rule would reasonably be extended to the case of a person obtaining the removal of a charge from his land, the former part is directly applicable to Wadsworth.

It was, indeed, suggested that the title did not appear to be a registered one; but this point was given up upon its being shewn that the mortgage itself was registered, and that



being made expressly subject to the conditions contained in the original grant from the Crown it was necessarily to be inferred that it had been patented. The learned Chancellor refused to give effect to the registration, because the registration had not been set up by the bill, and in furtherance of justice he declined to allow the plaintiffs to amend. The first question presented upon this branch of the case is, whether it was necessary expressly to set up registration; and the next is whether, if it were necessary, the Chancellor's decision upon that point can be sustained. The best opinion I have been able to form is, that there was no necessity to plead the registration of the assignment. The issue was, whether Wadsworth had notice, and not whether his assignment was registered. The registration is merely the evidence by which the plaintiffs sought to prove notice, and the plaintiff is not in equity, any more than at law, required, as a rule, to plead evidence.

His Lordship evidently thought that the question of notice was open upon the pleadings; for the first point he pronounces upon is, whether or not Wadsworth must be taken to have had notice of the assignment from its being known to Currie, who acted as his solicitor.

A consideration of the issues raised by the pleadings seems to shew that the learned Judge was right in treating the question of notice as one presented for determination. The defendants had expressly alleged that the mortgage had been paid off without notice of the assignment. The plaintiffs by their replication had denied this to be true. Both the elements in the defence, namely, payment and want of notice, seem to be involved in this denial. In reason the plaintiffs' joinder should be construed to mean a denial of the payment and of the averment that it was made without notice.

The authorities, I think, support this conclusion. It is too well settled to require any citation of cases that a plea of purchase for value was imperfect, unless it negatived notice, even if not alleged by the bill.

If the answers in this case had simply alleged payment



to Currie, they would not have met the bill, because payment to the original mortgagee is only sufficient when made without notice. That being so, and as the plaintiffs' replication ought to be taken to traverse every allegation material to the defence, the fact of notice would seem to have been put in issue.

I may refer to *Hughes v. Garner*, 2 Y. & C. 335, and the observations upon that case in *Kitchen v. Kitchen*, 16 Grant 232, but it is unnecessary to elaborate this point, because, as I repeat, the objection that *notice* was not pleaded was not that upon which the learned Judge proceeded. He thought that the plaintiff could not avail himself of any advantage from the registration, unless he had in some manner set it up by pleading.

I am aware that there is a prevalent notion that in certain cases it is necessary to claim the benefit of the Registry Acts, just as it has been held that under certain circumstances the benefit of the Statute of Frauds must be expressly claimed.

I doubt whether this rests upon a solid foundation in any case, but it has never been thought that it could be applied except where a party, by virtue of these acts, seeks to obtain priority, or insists that actual and not merely constructive notice must be shewn. The only use which the plaintiffs here desire to make of the registration is by way of proof of the notice. But, with great deference, I think that if it were necessary to plead it, leave should have been given.

The Administration of Justice Act of 1873, sec. 50, empowers the Court or Judge at any time during the progress of any action, suit, or other proceeding at law or in equity, upon the application of any of the parties, and whether the necessity for the required amendment shall or shall not be occasioned by the defect, error, act, default, or neglect of the party applying to amend, or without any such application, to make all such amendments as may seem necessary for advancement of justice, the prevention and redress of fraud, the determining of the rights and interests

of the respective parties, and the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case; and all such amendments *shall be made* upon such terms, as to payment of costs and otherwise, as to the Court or Judge ordering the same to be made shall seem just.

The 11th section of the Administration of Justice Act of 1874 gives this Court all the powers and duties, as to amendment, of the Judge from whom the appeal is had.

The learned Chancellor declined to permit the amendment, because he thought it would not be in furtherance of justice. While he held Wadsworth to have been guilty of negligence in not searching the register, and in not seeing that the mortgage on the land he was acquiring was discharged, he also held that Junkin had been still more culpably negligent. He is reported to have said:—"He also trusted to Currie, and that so entirely that, as the witness Junkin says, he relied upon his covenant that the money should be paid, and neglected all the precautions (the covenant excepted) ordinarily taken by the assignee of a mortgage, and his negligence has occasioned the present trouble and loss."

I have the misfortune to differ from His Lordship with regard to the view to be taken of these respective degrees of negligence. Wadsworth absolutely did nothing. He neglected to take any precaution whatever. On the other hand, Junkin did take the covenant, which His Lordship deems a precaution, and he saw that the assignment was registered. In fact all that he can be properly said to have omitted was either the requirement that Brown should join in the assignment, or the giving him notice of the assignment. It would not be necessary for him to do both, and so far as my experience goes, the concurrence of the mortgagor is very rarely obtained in this Province. His negligence then consisted solely in his failure to give notice of the assignment to Brown.

I must also respectfully dissent from the conclusion that

Junkin's negligence occasioned the present trouble and loss. On the contrary, by registering the assignment he had done everything that was requisite to protect a person in Wadsworth's position.

A mere notice to the mortgagor would not afford the same ample protection that registration gave to a person afterwards acquiring an interest in the land. The notice to the mortgagor would, for instance, be of no service to the purchaser of the land in the event of collusion between the mortgagor and mortgagee, and their joint suppression of the existence of the assignment.

Of course no one suspects, much less imputes, collusion in this case; but there are numerous reported cases to be found in the books where the mortgagor and mortgagee have successfully combined to conceal the true state of the title from an intending lender or purchaser, and in measuring the degrees of negligence to be imputed to the parties respectively, it is only just to take such possibilities into the account. Junkin had done enough to protect Wadsworth if he had used the commonest diligence; and it is scarcely open to the representatives of the latter now to urge that if Junkin had done something more this difficulty *might* not have occurred.

If therefore an amendment of the pleading be necessary to entitle the plaintiffs to avail themselves of the registry laws, I think it should have been allowed, and that it is our duty, under section 11 already referred to, to make it now.

It is an amendment proper for the determination of the real question in controversy between the parties, and in my opinion "the very right and justice of the case" (to adopt the language of the Legislature) does not call upon us to lean to one side rather than to the other.

But supposing the views I have expressed to be entirely erroneous, I am still of opinion that Wadsworth was clearly affected with notice.

The result of ignoring the registration and treating this as an unregistered title, is to throw us back upon the ordinary rules of equity with regard to notice.

If the rule of pleading be that the registration must be

set up, it applies equally to the defendants, for they have not alleged any registration or claimed the benefit of the Registry Acts.

Clearly then the doctrines of constructive notice would be applicable, and I think, upon principles too well established to admit of any controversy, Wadsworth would be held to have had constructive notice. His failure to make *any* enquiries for the mortgage deed would of itself suffice. The essence of the transaction in which he was engaged was, a purchase of the mortgaged land. He was to get an unincumbered title. The concurrence of two persons, viz., the mortgagee and the mortgagor, was necessary to carry out the bargain. Joint action on their part was necessary to convey him the property absolutely.

In substance he was purchasing the land from both of them, giving them his land by way of payment, and allowing them to arrange their respective interests in it as they pleased.

It was indifferent to him what they did with the land he was parting with, provided there were united in him the interests of both mortgagor and mortgagee in the land he was acquiring. It follows that he was bound to enquire for the mortgage deed. The case would have been different if he had *bonâ fide* enquired for the deed, and a reasonable excuse had been offered for its non-production.

The law upon this point has been summarized by Sir George Turner, in the well known case of *Hewitt v. Looseman*, 9 Ha. 458.

His conclusion was, that in transactions of sale and mortgage of estates, if there be no enquiry as to the title deeds which constitute the title to such property, the Court is justified in assuming that the purchaser or mortgagee has abstained from making the enquiry from a suspicion that his title would be affected if it was made, and is therefore *bound* to impute to him the knowledge which the enquiry, if made, would have imparted.

Even in the case of *Kennedy v. Green*, 3 M. & K. 699,



which was much relied upon by the defendants as an answer to the contention that notice must be imputed to Wadsworth, through Currie as his solicitor, it was held that if a party does not choose to take the prudent course of employing a solicitor he is in the same situation with respect to constructive notice, as if he had employed a solicitor.

While Lord Brougham was of opinion that the client would not be affected through the solicitor with notice of a fraud which the solicitor had himself committed, he held him bound by constructive notice, because if he had employed an independent solicitor, the enquiries, which would have necessarily been made, would have led to the discovery of the fraud.

A perusal of *Espin v. Pemberton*, 3 DeG. & J. 547, will, I think, lead to the conclusion that if there had been a total absence of enquiry Lord Chelmsford would have fixed the client with constructive notice. Indeed he adopted the judgment in *Hewitt v. Loosemore*, 9 Ha. 449, as a correct exposition of the law.

These two latter cases were with several others (including *Atterbury v. Wallis*, 8 DeG. M. & G. 454; *Rolland v. Hart*, L. R. 6 Ch. 763; and *Waldy v. Gray*, L. R. 20 Eq. 238,) discussed at the bar with relation to the question whether notice should be imputed in consequence of the solicitor's knowledge of the assignment, or whether there was such fraudulent conduct on the part of the solicitor as to justify the Court in holding that his knowledge was not the knowledge of his client. I confess that an examination of the cases makes me think that there is great force in Mr. Maclellan's argument that this case is governed by *Atterbury v. Wallis*. Indeed I have not succeeded in drawing any distinction between them that is at all satisfactory to my mind. Although in subsequent cases statements of the rule are to be found, which seem to be inconsistent with the *ratio decidendi*, its authority has never been impugned, but so far as I have observed is recognized in every instance. But the views I have already

expressed render it unnecessary to pursue this branch of the case any further; and we do not think that it would be judicious to attempt at present to lay down any general rule.

I think the appeal should be allowed, the ordinary foreclosure decree pronounced, and the costs of the appeal added to the plaintiffs' general costs of the cause.

BLAKE, V. C.—Brown, who owned the lot called "A," on the 26th September, 1862, mortgaged it to Currie to secure \$900, which mortgage, on the 3rd November following, Currie assigned to Junkin, who is now dead, and is represented by the plaintiffs, who are in this suit endeavouring to realise this mortgage.

On the 7th December, 1863, Brown conveyed the equity of redemption in the premises to one Wadsworth, there being then an agreement made for an exchange of properties between them, by which Brown undertook to have the property he was about to transfer to Wadsworth released from the mortgage in question, and he then arranged that this was to be done by his giving a mortgage in its place on the lot he (Brown) was then acquiring. Currie thereupon accepted the proposed mortgage, which has since been paid by Brown and discharged by Currie.

The assignee of the first mortgage has not been paid, and the question is, whether the plaintiffs have lost or whether they retain their right to charge the lands in the hands of Wadsworth with its amount.

Before the agreement between Wadsworth and Brown for an exchange, the assignment to Junkin had been registered. Under our registry laws Wadsworth therefore had notice, when he dealt with these premises, that there was a charge upon them in favour of Junkin. He chose to accept the promise of Messrs. Currie and Brown that this mortgage would be discharged, and he cannot now ask the Court to make a bargain for him, whereby, to the detriment of Junkin, the then holder of the mortgage, who had notified Wadsworth of his position, it is to be cancelled.

Junkin was no party to the transactions out of which the present difficulty has arisen. He had done all that the law requires him by publicly notifying, through the registry office, all desiring to deal with this land that he was the holder of a mortgage upon it. The over confidence or neglect of Wadsworth, or the dishonesty of the solicitor he employs, cannot furnish any valid reason for charging Junkin with consequences which affect injuriously a position in which Wadsworth has thus placed himself. The answer of Ann and George Wadsworth alleges that the payment of the mortgage was made to Currie, Brown "not having had notice, or being aware of such transfer to the said John Junkin," and it submits "that such payment having been made as aforesaid in good faith, and in ignorance of the transfer," the payment is good and satisfies the mortgage. The infants by their answer raise the same defence. This point was then at issue between the parties, "were the payments on the mortgage made with or without notice of the transfer?" I think, whether this issue be tendered by a plaintiff or defendant, it being accepted by the other side, as is the case here by the filing the replication, that he is enabled to prove the notice which is denied; and, that being so enabled, he can prove registration of the instrument with notice of which the party is sought to be affected, as this is none the less notice because it has been constituted notice by Act of Parliament.

I am of opinion that the plaintiffs are entitled to the usual decree for sale in mortgage cases, and that the costs of the appeal should be added to their costs of suit.

BURTON and PATTERSON, JJ.A., concurred.

*Appeal allowed.*

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## TRUMPOUR V. SAYLOR.

*Right to appeal—33 Vic. ch. 7, sec. 6—A. J. Act, 1873, sec. 44.*

*Held*, that there is no appeal to this Court where a verdict has been pronounced in the Q. B. or C. P., under 33 Vic. ch. 7, sec. 6, reversing the verdict of the Judge at the trial, *upon the weight of evidence*.

*Held*, also, that sec. 44 of the Administration of Justice Act, 1873, only confers a right of appeal against judgments pronounced under the authority of that Act.

## APPEAL from the Court of Queen's Bench.

The plaintiff declared upon an agreement in writing, by which he agreed to transfer to the defendant a mortgage made by one Titus, amounting to \$1,512, which the plaintiff held by assignment; in consideration for which the defendant agreed to transfer to the plaintiff a mortgage of one Duncan for about \$400, and a promissory note of one Marvin for about \$300, and to pay the remainder of the \$1,512 in three years, with interest at eight per cent. And it was averred that the defendant, in part performance of the agreement, delivered the Marvin note to the plaintiff, and that the plaintiff tendered an assignment of the Titus mortgage to the defendant, but the defendant refused to assign the Duncan mortgage.

A number of pleas were pleaded, none of which need be noticed except a general plea of fraud; two special pleas amounting to *non-assumpsit*, and setting out in substance that the written document was not executed to take effect as an agreement unless it appeared upon enquiry that certain representations made by the plaintiff concerning the subject matter of the agreement were correct, and alleging that the representations were incorrect; and a plea asserting that the Marvin note was not delivered in part performance of the agreement, but only on condition that it should be returned or the amount made good in case the proposed inquiries were not satisfactory.

Mr. Justice Burton, before whom the case was tried without a jury, found that the alleged verbal condition attached to the written instrument was not established,



and that there had been no misrepresentation by the plaintiff. He discredited the evidence of two of the defendant's witnesses, for reasons which he expressed in a note of his finding. A verdict was entered for the plaintiff for \$392.36.

The defendant obtained a rule *nisi* to set aside the verdict, and enter a verdict for the defendant, pursuant to the Law Reform Amendment Act, and on the ground that the verdict was contrary to law and evidence, and against the weight of evidence.

This appeal was from the decision of the Court of Queen's Bench making that rule absolute.

The reasons for and against the appeal are omitted, as the judgment turns solely on the objection taken by Mr. Kerr to the jurisdiction of the Court to hear the appeal.

The case was argued on the 6th January, 1877 (*a*).

*J. K. Kerr*, Q. C., with him *W. G. P. Cassels*. There can be no appeal in this case, as the decision of the Court was grounded on the weight of evidence. The statute 33 Vic. ch. 7, sec. 6, O., by which the Court, in reviewing the verdict of a Judge, is empowered to enter a verdict instead of ordering a new trial, only allows an appeal from the judgment of the Court on the same ground as if it had been to grant a new trial; and if the Court had granted a new trial in the present case, there could have been no appeal: C. S. U. C. ch. 13, sec. 26; *Hall v. Hamilton*, 24 C. P. 304; *Symington v. Symington*, L. R. 2 Sc. App. 287; *The Glannibanta Case*, L. R. 1 P. D. 283; and *McMathew v. McMathew* (not yet reported).

*M. C. Cameron*, Q. C., for the respondent, contended that the Court had jurisdiction conferred upon it to hear the appeal, by the Administration of Justice Act, 1873, sec. 44, and the Administration of Justice Act, 1874, sec. 11.

Feb. 20, 1877. PATTERSON, J. A.—We have not been furnished with any statement of the grounds upon which the decision proceeded.

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(*a*) *Present*.—PATTERSON and MOSS, JJ. A., GALT, J., and BLAKE, V. C.

It is objected by Mr. Kerr that no appeal lies from the decision in question, because an appeal is only given by the statute on the same ground as if the decision of the Court had been to grant a new trial; and this decision being evidently grounded on the weight of evidence, it must be governed by the rule which forbids an appeal from a rule granting a new trial upon that ground.

In *Wilson v. Canadian Bank of Commerce*, 36 U. C. R. 31, I intimated that the statute must be read as now suggested. Further discussion and consideration have confirmed the opinion that we must hold, however reluctantly, that in such cases as the present there is no right of appeal.

There are two questions involved, viz., 1. In what cases does the law authorize the Court *in banc* to vary or reverse the verdict of the Judge who tries the cause? 2. To what extent can a decision of the Court, under the statute, be reviewed by this Court?

The Law Reform Act of 1868 (32 Vic. ch. 6, sec. 18, subsec. 2,) enacted that the verdict or finding of the Judge should have the like effect as the verdict or finding of a jury: provided that the parties should be entitled to move against such verdict or finding, by motion for nonsuit, new trial, or otherwise, within the same time, and on the same grounds (including objections against the sufficiency of the evidence, or the erroneous view taken of the evidence), as allowed in cases of trial or assessment by a jury.

The words in parenthesis were evidently inserted by way of precaution, and to guard against the construction that the Judge's finding could only be questioned on the same grounds as a Judge's charge; and to make the intention clear that his finding of facts on the evidence, as well as his ruling on the law, should be subject to review, the policy of the Act differing in this respect from that of the English Common Law Procedure Act of 1854, which expressly declared that the verdict of a Judge should not be questioned upon the ground of being against the weight of evidence.

Under the Act of 1868, therefore, the right to move for a new trial is given or preserved in cases which it may be convenient to describe as forming two classes :

1st. When the objection is to the Judge's finding either upon the law or the facts.

2nd. When for any other reason, as *e. g.*, on account of surprise or discovery of new evidence, a further investigation seems proper.

The Act of 1869, 33 Vic. ch. 7, sec. 6, enacts that whenever the verdict or finding of the Judge is moved against under sub-sec. 2 of sec. 18 of the Act of 1868, it shall not be obligatory on the Court to grant a new trial when the objections taken are against (*a*) the sufficiency of the evidence, (*b*) the erroneous view taken thereof by the Judge, or (*c*) his mistaken view of the law of the case ; but the Court may pronounce the verdict which, in their judgment, the Judge who tried the cause ought to have pronounced, and amend the *postea*, and enter the verdict accordingly, subject nevertheless to appeal on the same grounds as if the decision of the Court had been to grant a new trial instead of ordering the *postea* to be amended.

This Act adopts the words of the former one as to the sufficiency of the evidence, or the erroneous view taken of it. It must be taken to use this language in the same sense as the earlier Act, and to authorize the Court to vary or reverse the finding of the Judge in all cases within what I have above described as the first class.

There is much force in the contention that this reading of the statute leaves the finding of the Judge, who sees and hears the witnesses, liable to be reversed by a tribunal before which the evidence comes only in a written form, and with all the imperfection incident to notes hastily taken, habitually abbreviated, and always thrown into narrative form, and as much in the language of the reporter as of the witness ; but the objection appeals rather to the discretion and judgment of the Court in the exercise of its power of review, than to the existence of the jurisdiction.

The limits which an Appellate Court should impose on

itself, and the hesitation with which it should attempt to interfere with the finding of a Judge upon questions of fact depending on testimony given *vivá voce* before him, have frequently been pointed out. Among the more recent cases in which this has been done are *Symington v. Symington*, L. R. 2 Sc. App. at p. 424; *The Glannibanta*, L. R. 1 P. D. 283, and *Bigsby v. Dickinson*, L. R. 4 Chy. D. 24. The language of Bramwell, J. A., in the last named case, is very pertinent to the question of the actual existence of the jurisdiction and the duty of the Court to exercise it in a proper case, though with due respect to the finding of the Judge before whom the witnesses give their evidence.

He is reported to have said: "We were also reminded that the Vice-Chancellor had had the advantage of the living witnesses before him, whereas we only had their evidence on paper, without the opportunity of seeing and judging of them and and their demeanor; and that is true, and it is a thing that ought to be particularly impressed upon us at this moment, when we know that the Legislature has made a change in the mode of giving evidence in these Courts, which may be said to have succeeded to the business of the equity Courts, by directing that as a rule it shall be *vivá voce*, and not in writing—a most excellent provision in my judgment. Now these three things were all put before us by Mr. Kay. There is a general observation, not exactly in answer to that, but an observation which might be made on the other side, which is this, that the Legislature has contemplated and made provision for our reversing a judgment of the Vice-Chancellor where the burden of proof has been held by him not to have been sustained by the plaintiff, and where he has had the living witnesses, and we have not. If we were to be deterred by such considerations as those that have been presented to us from reversing a decision from which we dissent, it would have been better at once to say that in such cases there should be no appeal."

It is thus clear that the decision of the Queen's Bench is within the jurisdiction conferred by the statute. The



question remains to be considered, can it be reviewed by this Court ?

The words are, "Subject to appeal upon the same grounds as if the decision of the Court had been to grant a new trial."

The only case in which an appeal is given from the decision on a motion for a new trial, is when the motion is on the ground that the Judge has not ruled according to law : C. S. U. C. ch. 13, sec. 24. And to this absence of authority to appeal, there is added an affirmative denial of the right when the application is on matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise : sec. 26.

Under the Law Reform Act, 32 Vic. ch. 7, the functions of Judge and jury are combined in the Judge for the purposes of the trial, and on a motion for a new trial it is not necessary to discriminate between them ; but for the purpose of appeal the Act of 1869 regards them as distinct. By the reference to the previously existing law, it allows an appeal when the Court reverses the *ruling as Judge*, but no appeal when it touches only the *finding as jury*.

It is difficult to avoid the impression that this result is probably due rather to inadvertence in the framing of the clause, than to any distinct intention to withhold the right of appeal when a question of fact is decided on the impression conveyed by the notes of evidence, in opposition to the finding of the Judge in whose presence the evidence was taken, and whose opinion may have been influenced not only by the degree of credence he accorded to this witness or to that, but by matters understood and conceded by all concerned at the trial, and which may not be fully apparent from the notes ; or to any intention to place the decision of questions of fact in the common law Courts under a different rule from that applied to decisions in equity.

Our duty, however, is to construe the statute as we find it, and to hold that the objection having been only to the finding on the evidence, no question of law being involved, the decision is not subject to review.

We were referred to the Administration of Justice Acts as probably extending the right of appeal so as to reach cases of this class. It does not seem that either of those Acts can, on any fair construction, be held to have that effect.

The first Act, 36 Vic. ch. 8, confers new powers on the Courts, both of law and equity, and declares some powers which perhaps were not new.

The Courts of common law have power given, amongst other things, to deal with equitable defences in ejectment; to investigate equitable interests in lands, and to make them available in execution; to make, in any case, whatever decree or order the equitable rights of the parties may require; to add third parties; to strike out parties; to direct accounts to be taken, &c.; and express power is given for one Judge or two Judges to sit as the Court.

The Court of Chancery is enabled in effect to entertain actions of ejectment; and to all the Courts alike power is given to transfer cases from one to the other; to try in a summary way questions respecting conveyances alleged to be fraudulent; and to decide the validity of demurrers or objections made by parties upon the oral examinations which the Act institutes.

Then section 44 declares that an appeal "shall lie against every judgment, decree, rule, or order made by either of the Superior Courts of law, or the Court of Chancery or by a Judge of any one of the said Courts, under the authority of this Act, in the same way, under the same conditions, to the same extent, and within the same time, as before the passing of this Act an appeal might have been had from a like judgment, decree, or order of the said Court of Chancery, or a Judge thereof, in a similar case."

This provision appears intended only to assert the right of appeal from judgments, &c., *under the authority of this Act*. If the words italicised could be read as referring only to a Judge sitting alone under the authority of the Act, which is their immediate connection in the sentence, the clause would be wide enough to give an appeal from every

order or judgment, from an order to amend a clerical error, or to revise taxation of costs, to the final judgment in the cause. But that it is not so intended is made apparent by attempting to read it as it refers to the Court of Chancery. The reading would be thus : An appeal shall lie from every decree of the Court of Chancery, or a Judge thereof, in the same way, &c., as before the passing of this Act an appeal might have been had from a like decree of the said Court of Chancery, or a Judge thereof, in a similar case. This would be obviously futile legislation. The object of the clause is evidently only to provide an appeal in the cases in which, without such provision, an appeal might not have lain, viz., when the action of the Court is under the new jurisdiction which the Act creates.

The clause in the Act of 1874 (37 Vic. ch. 7, sec. 11, O.), is still more clearly inapplicable. It enacts that "The Court of Error and Appeal shall have all the powers and duties as to amendment and otherwise of the Court or Judge from which or whom the appeal is had, together with full discretionary power to receive further evidence upon questions of fact. \* \* The Court shall have power to give any judgment, and make any decree or order which ought to have been made, and to make such further or other order as the case may require."

This section gives the most ample powers of dealing with any case before the Court, but does not give a right to appeal in any case where it did not already exist.

We must dispose of the case as we did in *Hall v. Hamilton*, 24 C. P. 302, and quash the appeal with costs.

Moss, J.A.—I regret to be obliged to arrive at the same conclusion, but I see no mode of escape from so unfortunate a result. It may be that the consequences to the plaintiff would have been the same if we had been at liberty to entertain this appeal.

Upon this point it would not be proper to express any opinion as the preliminary objection to our jurisdiction must prevail. The source of my regret is that by an enact-



ment, which I am convinced was passed in its present shape *per incuriam*, the plaintiff is precluded from having his appeal disposed of upon the merits.

I cannot believe that the Legislature deliberately intended that the decision upon a question of fact by a common law Judge should be a subject to absolute reversal, and a final decision beyond appeal pronounced by the Court in favour of the opposite party, upon the ground that the Judge took an erroneous view of the evidence, or, in other words, that his verdict was against the weight of evidence. Such an enactment is quite opposed to the whole spirit of more recent legislation. It introduces a difference in effect between the decree of a Judge of the Court of Chancery and the decision of a Judge of one of the Courts of Common Law, which could never have been intended.

The decree of the former can be re-heard before the Court, on the ground that the preponderance of evidence is against its correctness; and the judgment of the Court may be afterwards reviewed in this Court, or even in the Supreme Court of the Dominion.

According to our present decision, if for the Chancery Judge you substitute a common law Judge, and style his judgment a verdict instead of a decree, it may be irrevocably reversed by the Court of common law. The results are sufficiently curious to deserve a passing notice.

A Judge of the Common Pleas may decide for the plaintiff in a case depending wholly upon the view to be taken of the evidence, and involving no question of law.

The case may be in the Queen's Bench, and defendant may move the Court to enter a verdict for him, which the majority of the Court may do, although the other member agrees with the Judge of first instance.

Again, in large classes of cases there is now a concurrent jurisdiction in law and in equity. It will in these depend upon the tribunal which has been selected, whether the unsuccessful litigant shall have a right of appeal.

It would seem extremely anomalous that if a person aggrieved by the infringement of his patent sought to



establish its validity by an action of damages at law, he might be concluded by the judgment of the Court in which his action was brought, while if he had filed a bill to restrain infringement, and for damages, he could invoke the judgment of the highest tribunal in the country.

In this very case, if a jury had found as the learned Judge did, the worst that could have befallen the plaintiff was, to be required to submit his case to another jury, and I do not hesitate to say that in my humble opinion it is improbable that a new trial would have been granted. There was plenty of evidence, if they gave it credence, to have justified this verdict, just as there was abundance to have warranted a verdict the other way, if believed; and I cannot help thinking that a motion for a new trial would probably have been disposed of on the ground that the matter was peculiarly within the province of the jury.

We should undoubtedly be astute to discover reasons for not reading the statutes in such a way as to lead to these anomalous results. But the language used by the Legislature does not seem susceptible of any other interpretation.

By the Law Reform Act of 1868, the trial by a Judge of issues of fact in a civil action was permitted. Before that statute, if in the judgment of the Court a verdict was against the weight of evidence, the only remedy was to send it down for the opinion of another jury.

The Act of 1868 gave the unsuccessful party the right to move against the verdict of a Judge "by motion for nonsuit, new trial or otherwise, on the same grounds (including objections against the sufficiency or the erroneous view taken of the evidence), as allowed in cases of a trial by a jury." By this Act the Legislature evidently intended that the verdict should be open to objection upon all the questions either of law or of fact that might have been urged against it if the trial had been before a jury, the words in brackets having been inserted by way of precaution, and partly perhaps to shew beyond dispute that the verdict of the Judge upon mere questions of fact was not to possess

the incontrovertible character given to such a verdict by the English Common Law Procedure Act.

As previously the only mode of complaining that the Judge had erroneously ruled that there was evidence, or that he had misdirected the jury, or that the jury had found against the weight of evidence, was by motion for a new trial, it seems to have been thought that the same remedy only was applicable under this Act, when the objection was against the sufficiency of the evidence, or a mistaken view of the law of the case, or an erroneous view of the evidence.

This was obviously inconvenient, for the objection might go to the root of the case. It might appear that upon some undoubted proposition of law the party moving must finally succeed.

In such a case it seemed absurd to send the case down for a new trial, although no other course was possible where the verdict had to be pronounced by a jury, unless, indeed leave had been reserved.

To remedy this inconvenience, 33 Vict. ch. 7, sec. 6, O., provided that instead of granting a new trial, where the objections taken are any of those I have previously mentioned, the Court may pronounce the verdict which, in their judgment, the Judge who tried the case ought to have pronounced, subject nevertheless to appeal *on the same grounds as if the decision of the Court had been to grant a new trial*.

Now, the Act of 1868 had not in any way enlarged the right to appeal against the decision of the Court upon a motion against the Judge's verdict. If their decision would have been appealable in case the verdict had been delivered by a jury, it was still appealable, but not otherwise. By sec. 26, ch. 13, Consol. Stat. U. C., an appeal could not be brought if the decision was for granting a new trial on the ground that the verdict was against the weight of evidence.

Couple with that the limitation of the right to appeal against the entry by the Court of a verdict different from

that of the Judge, to the same grounds as if the decision had been to grant a new trial, and it seems clear that the alteration of the verdict could not be reviewed on appeal, if the ground of decision were that the Judge's finding was against the weight of evidence.

I had hoped that the provisions of the Administration of Justice Act of 1873 might have been found wide enough to cover this case; but my brother Patterson's examination of the terms of the only section applicable has shewn that it was only intended to confer a right of appeal against judgments pronounced under the authority of that Act, and not to enlarge the right of appeal in the case of any decision that did not depend upon its provisions.

We are not informed of the grounds upon which the Court below proceeded, but it seems clear that the only possible ground for disturbing the verdict was disagreement with the learned Judge's view of the preponderance of the evidence. There was no question of pure law involved. Indeed, so far as I can perceive, the determination of the case turned upon the degree of credibility to be attached to the witnesses. I do not suppose that the Court below entertained that opinion, for if so, they would not, I think, have placed their judgment above that of the Judge who saw and heard the witnesses. They must have thought that there were circumstances to be noticed, or inferences to be drawn, which entitled the defendant to the verdict, notwithstanding the Judge's conclusion as to the credibility of the witnesses.

The appeal must therefore be quashed.

BLAKE, V. C.—The Court of Queen's Bench did not attach the weight to the evidence for the defendant that was given to it by the learned Judge before whom the case was tried. It was a matter for the discretion of the Court, and having exercised it as they have, there is no means of redress in this Court.

I regret that I feel constrained to concur in the judgment of my brother Patterson, as, except for the difficulty thus



presented in the way of this Court's interference, I do not think the judgment of the Court below should be sustained.

Reluctantly I agree that the appeal must be dismissed with costs.

GALT, J., concurred.

*Appeal dismissed, with costs.*

Rv. 2 SCR 431.

GRAY V. RICHFORD ET AL.

*Ejectment—Statute of Limitations—Acceptance of deed by person in possession.*

About the year 1830 one James Gray took possession of lot 13 in the first concession of East Hawkesbury, and resided on the west half, three of his sons, John, Andrew, and Adam, living and working with him, until about 1847-8, when Adam under the expectation that the land would be his, entered into possession of the east half, with the permission of his father, who subsequently, in 1848, devised it to him by will, and afterwards spoke of him as owner; and although the father up to the time of his death, in 1857, assisted Adam in working this piece, the possession appeared to be exclusively Adam's, who was assessed as owner and paid the taxes, &c. After the father's death, Adam and those claiming under him continued the possession until the commencement of this suit. In 1857 the father made a second will, devising this east half to his son John with an executory devise over, on failure of issue, to his son Thomas. In 1862, while Adam was so in possession, he obtained a conveyance with full covenants for title from John. In 1874 John died unmarried, and without lawful issue; and on the 5th May, 1875, Thomas brought ejectment against defendants claiming under Adam; but neither at the trial nor in term was any question raised as to the effect of John's deed.

*Held*, in the Court of C. P., that the plaintiff could not recover, for, without considering the effect of John's deed, there was sufficient evidence of possession in the defendants to give them the title under the Statute of Limitations, the possession of Adam having been under the evidence an exclusive possession as owner.

On appeal, the effect of John's deed having been argued and considered:

*Held*, per PATTERSON and Moss, JJ.A., that its effect was to stop the running of the statute, and create a fresh statutory point, for after the deed, Adam's possession became rightful; so the defendants had not acquired the title by possession as against Thomas, and that therefore the judgment should be reversed.

Per BURTON, J.A., and HARRISON, C.J., that no such effect should be given to the deed: that defendants had acquired the title under the statute; and that the judgment should be affirmed.

Per HARRISON, C.J., that the question not having been raised in the Court below should not be given effect to in appeal.

Per Moss, J.A., the Court should not refuse to entertain the point, for it was not one which could be effected by further evidence.



EJECTMENT to recover possession of the east half of lot No. 13 and the broken front thereof, in the 1st concession of East Hawkesbury.

The plaintiff, Thomas Gray, claimed title as devisee under the last will and testament of his father, James Gray, dated 30th January, 1857.

The defendant William Richford, besides denying the plaintiff's title, claimed title as tenant of Andrew McConnell.

The defendant McConnell, as landlord, appeared by leave of the Court, and besides denying the plaintiff's title claimed title by twenty years' adverse possession, and also under a deed from John Gray to Adam Gray, dated 31st March, 1862, and under certain deeds from Adam Gray to himself, dated 20th June, 1862, and 15th September, 1868, respectively.

The cause was tried before Galt, J., without a jury, at L'Orignal, at the Spring Assizes of 1876.

From the evidence it appeared that about the year 1830, James Gray went into possession of the whole lot No. 13, with other lands, and resided on the west half of the lot. Three of his sons, John, Adam, and Andrew, resided with him; and for a number of years they all worked together.

About the year 1847 or 1848, Adam, with his father's permission, moved on to the east half of the lot, and took possession of it, building a house and barn, &c., on it. There was some evidence given to shew that the father controlled both halves, and that he did some work on the east half a few days before his death, which took place in August, 1857.

On the 10th October, 1848, James Gray made a will devising the east half to his son Adam, with the words: "This considered to become in force after the decease of my wife and myself." It was duly witnessed, and McCallum, one of the witnesses, was examined at the trial.

Evidence was also given to shew that the father spoke of the land as Adam's, and that he sent a witness who wished to purchase timber off it to Adam.

Besides the three sons already mentioned, James Gray had two other sons, William and Thomas, the plaintiff.

*William Gray* was called as a witness, and stated: "My lot is the west half of 12. Adam was in possession of the east half of 13 from 1845 to 1860. My father, my brother Andrew, and myself were all working together on both the east and west halves. Notwithstanding we all worked together, each had his own 100 acres. Adam would get the crop off the east half. John would get the crop off the west half. Tom had 100 acres of lot 14, and Andrew also 100 acres of lot 14. My father paid for the land."

On cross-examination he stated: "John and Adam and the old man were working pretty much all together up to the old man's death. They had to do as the old man ordered them. My father gave me a deed. He gave John a deed. He gave Thomas a deed, and Andrew a deed. He kept the east half of 13 for himself."

On re-examination he stated: "I got my deed in 1845 or 1846. We got them all at the same time. None was prepared for Adam. My father used to speak of this land as "our Adam's."

It was also proved that in 1849 Adam was assessed as owner for the taxes.

On the 30th January, 1857, Adam made another will, devising the east half to John Gray, his eldest son, and on his death, without issue, then to Thomas the plaintiff, with a proviso that John should support the testator and his wife.

On the 22nd October, 1857, Adam caused the will devising the land to him to be registered.

The second will was registered on the 28th August, 1858.

On the 26th April, 1858, Adam Gray conveyed to Andrew McConnell the rear 50 acres of the east half.

On the 31st March, 1862, John Gray conveyed this east half to Adam Gray, by deed containing absolute covenants for title, and executed also by Adam Gray.

On the 20th June, 1862, Adam and wife conveyed in fee to McConnell one acre of the east half.

On the 15th September, 1868, Adam Gray and wife conveyed in fee to McConnell the east half and the broken front.

In 1874 John Gray, the original devisee under the second will, died unmarried, and without lawful issue.

The evidence of James Gray, a son of Adam Gray, living in Michigan, taken under a commission, was put in. He stated that he understood that the land was purchased by the brothers as partners, and was to be held by them in that way until it was paid for; and that when the land was paid for it was divided between the brothers by survey; and this particular piece of land belonged to Adam Gray, his father. "The title stood in my grandfather, but the division was to be made as above stated; but in his old age my grandfather was persuaded by Thomas Gray to make a will of the land to John Gray, but it was understood to be and was called Adam Gray's land, and was in fact paid for by him."

This action was commenced on the 5th January, 1875.

At the trial no question was raised as to the effect of the deed from John to Adam.

Evidence was also given to shew the value of the improvements made by defendant McConnell.

The learned Judge found that James Gray, the father, had at the time of his death acquired a title to the lot by length of possession: that he died in possession, having devised this lot to his son John, with a devise over to the plaintiff: that at the time when the defendant McConnell made the improvements, he was under the belief that the land was his own. And he assessed the improvements at \$400, namely, \$200 for the houses, and \$200 for the other improvements; and he entered a verdict for the plaintiff.

In Easter term, May 18th, 1876, *Richards*, Q.C., obtained a rule *nisi* to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendants, or for a new trial, on the ground that the verdict was against law and evidence, in that the plaintiff shewed no complete paper title to the

land, but sought to establish a title by the Statute of Limitations, and length of possession in the late James Gray: that such title was not made out: that title was made out in the defendant McConnell by length of possession by him and Adam Gray, under whom he claimed title; and that on the evidence the defendants were entitled to a verdict.

In the same term *Osler* shewed cause.

*Richards*, Q.C., contra.

HAGARTY, C. J.—It seems clear on the whole evidence that Adam Gray was in actual possession of this land for many years before his father's death, and much more than twenty years before the commencement of this suit.

It may be quite true that the father worked on it down to shortly before his death, but on the evidence I think this is quite consistent with Adam's exclusive possession as owner. The evidence of William Gray supports this view.

Adam was assessed for the property, and while in possession his father made a will expressly devising it to him, and spoke of him as owner. The will, of course, was inoperative, but it is important as shewing the position and understanding of the parties.

The plaintiff put in a commission. He examined James Gray, a son of Adam, living in Michigan. He says that he understood the land was purchased by the brothers as partners, to be held in that way till paid for, and when paid for it was to be divided between the brothers, and this particular land belonged to Adam, and was understood to be Adam's, and was paid for by him.

I think there was very fair evidence of nearly thirty years' possession in Adam and those claiming through him. I think a jury would certainly find such a possession with a proper direction, and that the fair inference from all the facts is in its favour.

No question was raised as to the effect of the deed from John Gray to Adam in 1862.



Rule absolute to enter a verdict for defendant.

GWYNNE, J.—I entirely concur in the judgment of the Chief Justice. It is unnecessary to determine whether any estate passed at all in respect of the land in question under James Gray's will in favour of his sons, John and Thomas, by reason of his not having been in possession of the land, as I think the evidence shews he was not at the time of making that will or at the time of his death, (treating James Gray's title to have originated merely in possession, which was the case made by the plaintiff); for I am of opinion that even if James Gray ever had a perfect paper title to the land in question, there was abundant evidence to warrant the inference that Adam Gray was in possession of the land as far back as 1847, certainly;—if not as far back as 1842, and that such possession had matured into a perfect title against James Gray and all persons claiming under him long before this action was brought.

GALT, J., concurred.

*Rule absolute.*

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From this judgment the plaintiff appealed.

The following were the appellant's reasons of appeal :

The appellant (the plaintiff) submits that the judgment of the Court of Common Pleas is erroneous, and should be reversed, and the rule *nisi* discharged, for the following reasons :

1. James Gray, the testator, went into actual possession of the land in question in 1830, and remained in possession until his death.

In any event James Gray, the testator, had actual possession for a sufficient length of time, before it can be pretended that Adam Gray had any possession, to raise a *primâ facie* presumption of seisin in fee: *Asher v. Whitlock*, L. R. 1 Q. B. 1.

3. Adam Gray had acquired no possession as against his father during the life time of the latter: *Orr v. Orr*, 31 U. C. R. 13; *Holmes v. Holmes*, 17 Grant 610; *Foster v. Emerson*, 5 Grant 135; *McKinnon v. McDonald*, 11 Grant 432; *Truesdell v. Cook*, 18 Grant 532; *Groves v. Groves*, 10 Q. B. 486; *McArthur v. McArthur*, 14 U. C. R. 544; *Rumrell v. Henderson*, 22 C. P. 181.

4. But even if Adam Gray had possession as against James Gray, the testator, before his death, he had not acquired any title by length of possession on the 21st March, 1862, and on that day John Gray under the will of James Gray was entitled to the lot in fee with an executory devise over to the plaintiff: *Jarman on Wills*, vol. 1, page 822. On the said 21st March, 1862, John Gray conveyed this land to Adam Gray. The acceptance of this land by Adam Gray made his possession of the land rightful and put an end to the running of the statute of limitations. McConnell had previously reconveyed the rear fifty acres to Adam Gray. Adam Gray afterwards, in September, 1868, conveyed the land to McConnell. The plaintiff could bring no action until the death of John Gray, as the defendant was in possession by deed from him.: *Brown on the Statute of Limitations*, as to real property, page 622; *James v. Salter*, 3 Bing. N. C. 544, 554.

5. Adam Gray entered under his father, and neither he nor the defendant, who claims under him, can dispute James Gray's, the testator's, title.

6. The defendant is not within the protection of 36 Vic. ch. 22: *Gummerson v. Banting*, 18 Grant 516; *Carrick v. Smith*, 34 U. C. R. 401; *Smith v. Gibson*, 25 C. P. 248.

The following were the respondents' reasons against the appeal:—

The respondents contend that the judgment of the Court of Common Pleas is correct, and that the appeal should be dismissed, with costs, for the following reasons:—

1. The plaintiff claimed the land in question as devisee of James Gray, and asserted title in said James Gray by

length of possession, but the evidence was not sufficient to establish such title.

2. The defendants shewed title in defendant Andrew McConnell by length of possession by himself and Adam Gray, through whom he claims.

3. Even if title had been shewn in James Gray, his will, under which plaintiff claims, would give a fee simple or fee tail to John Gray, whose deed of 31st March, 1862, would pass the estate to Adam Gray.

4. The plaintiff shewed no right to recover the land in question in this action.

The case was argued on the 22nd December, 1876 (a).

The arguments fully appear in the reasons for and against the appeal.

*Bethune Q. C.*, for the appellant, in addition to the cases cited in the reasons of appeal, referred to *Finch v. Lane*, L. R. 10 Eq. 503; *Coltsman v. Coltsman*, L. R. 3 H. L. 121.

*Richards, Q. C.*, for the respondent cited *McNish v. Munro*, 25 C. P. 290; *Henderson v. Morrison*, 18 C. P. 221; *Thompson v. Bennett*, 22 C. P. 393; *Doe Woodhouse v. Powell*, 8 Q. B. 576; *Doe Perry v. Henderson*, 3 U. C. R. 502.

March 15, 1877 (a). BURTON, J. A.—The only point calling for serious consideration in this case is the effect of the acceptance by Adam Gray of a deed from his brother John of the premises sought to be recovered in this action.

Why the defendants should have been advised to set up title under it, when they had a good *prima facie* defence, under the Statute of Limitations, it is difficult to understand.

At the time of the death of Gray, the father, Adam was in possession with the father's consent. There is good reason to infer that the will made in his favour was made in consideration of his services in working upon and im-

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(a) BURTON and PATTERSON, JJ.A., HARRISON, C.J., and MOSS, J.A.

proving the farm, rather than an act of bounty merely on the part of his father. There is, however, no evidence of any agreement to that effect; and, so far as appears, he might have been ejected at any time by his father during his life time.

Shortly before his death, the father made a second will, revoking the former one, and devising the same property to John in fee, with an executory devise over to the present plaintiff.

Whether the existence of the second will was ever made known to Adam does not very clearly appear. The inference rather is, that John was asserting title under it, and that, in order to get rid of his claim, Adam purchased out his interest; and it is more than probable that all parties then assumed that he had the power to give an indefeasible title. I should assume this to be the fact from the nature of the covenants in John's deed.

There is a suggestion in the examinations of the witnesses under the commission executed in the United States, that John had obtained a deed in his own favour in 1860 from Mr. Forsyth Grant, but no such deed was produced at the trial, nor is it now alleged that any such deed existed: all this is, however, left to conjecture. Beyond the fact of the deed from John to Adam being made and accepted, we are without any evidence of the motives of the parties, or of the surrounding circumstances.

The plaintiff made out his case at the trial by proving a possession in the father for many years, raising a presumption of a seisin in fee: that Adam went into possession under him, and thereafter claimed it as his own; and the execution of the will under which he (the plaintiff) claimed. There was ample evidence of Adam having been in possession for over twenty years, and that the statute had commenced to run before his father's death; but this was answered, or is now answered, for nothing seems to have turned upon it at the trial, by alleging that the running of the statute was put an end to by the conveyance from John.



If it had been made clearly to appear at the trial that John was asserting title under the second will and that, in order to avoid an ejectment, Adam had accepted a conveyance from John, I should be unable, I think, to distinguish the case from *Board v. Board*, L. R. 9 Q. B. 48.

In that case A, who was merely tenant by the curtesy of certain premises, and who had therefore no devisable interest, assumed to devise them to his daughter for life, with remainder to his grandson William. On the death of the testator, his daughter entered, and under the terms of the will paid certain annuities granted by it, and continued in possession for over twenty years. The daughter, after thus acquiring a title as against the real owner, the heir-at-law, conveyed the premises to the defendant. The remainderman, or his grantee, brought ejectment; and the Court held that, although as against the heir-at-law the daughter had acquired an indefeasible title, she, and those claiming through her, were estopped as against those in remainder from disputing the validity of the will, and that the plaintiff, claiming under the remainderman, was entitled to recover.

Although Adam did not come in originally under the will, but was in possession previously and claiming adversely to it, I should find it very difficult to say, as at present advised, that, if it had been proved that he was threatened with proceedings to recover possession by John claiming as devisee under the second will, and that he had expressly recognized his title and taken a conveyance from him, he could now be heard to dispute the plaintiff's title claiming under the same will. That is, however, not shewn.

It is in that respect more like the case of *Paine v. Jones*, L. R. 18 Eq. 327, where the devisee went into possession under the impression that the lands had been devised to her, but in point of fact they had been acquired by the testator after the making of the will. She remained in possession under that impression for over twenty years,

and then discovered the fact, but was advised at the same time that she had acquired a good title by adverse possession.

A number of cases were there referred to, and the Vice-Chancellor, in disposing of the case, remarked: "All these cases proceed on the principle that if parties have no other title than the will, they are estopped from denying the title of persons under the same will. Under this will the widow had no title whatever. The defendant had a title under the will. I think this is a distinct case of adverse possession; and the defendants, claiming under the widow, have acquired a title as against those persons whose title is only under the will."

John could not by any act of his defeat the title of the executory devisee, but if he had remained passive, it is quite clear that Adam would have acquired a title, not only against him but as against all parties claiming under the father, including the present plaintiff.

It is not shewn here that Adam recognized or even that he knew at that time of the other will; and my impression is, that, in the absence of such evidence, Adam was not estopped from asserting title against the persons claiming under that will, from the mere fact of having taken a conveyance from the devisee.

But it is said that the acceptance of a deed from the person having the right of entry is equivalent to a dispossession by John in exercise of that right; and it cannot be doubted that, if he had been so dispossessed, even for a single moment, and, *à fortiori*, if, in recognition of that title, he had attorned, there would have been created a new *terminus à quo*, and that, as against the executory devisee, the statute would run from it only.

As already intimated, the evidence would appear to warrant the conclusion that this land was not only intended for Adam, but the father was under a moral, if not a legal, obligation to give it to him; and in pursuance of that feeling he executed a will in his favour, and gave up to him the possession.

The case seems then to fall within that section of the Act, which provides that when the person claiming, or some person through whom he claims, shall, in respect of the estate claimed, have been in possession, and shall, while entitled thereto, have discontinued such possession, then the right shall be deemed to have first accrued at the time of such discontinuance.

Here the father, through whom the plaintiff claims, abandoned the possession, which was followed simultaneously with such abandonment by the actual possession of Adam, which possession in himself, or those claiming through him, has continued ever since. But Adam, the person in possession, was the party in whose favour and for whose protection the Act was intended to operate.

It is quite true that the father or John might, notwithstanding such abandonment, at any time within twenty years reassert their right to the possession; but, if they did not do so, the right of the present plaintiff would be barred. Can he be in a better position because, in place of asserting the right, the party for the time being entitled, releases it? John could certainly abstain from enforcing it, and the remainderman, so far as I have been able to ascertain, would be without remedy either at law or in equity to compel him to take action.

If, instead of a formal conveyance, he had executed a document reciting that he was entitled to a right of entry, but that he thought it would be contrary to morality and good conscience that he should exercise it, and he therefore released it, such a document would bar him and his assigns, but would not of course prevent the remainderman or executory devisee from asserting his claim, provided his right accrued within twenty years of the discontinuance.

It is not a case of tenancy at all. The holding by sufferance merely is not equivalent to a tenancy at will. Here the owner gave up and discontinued the possession. That possession became the possession of Adam, liable to be defeated in the event of the real owner electing to

treat him as a trespasser. If he did not so elect, his right, after a certain period, would be barred. Is there anything to prevent his binding himself not to exercise that right? In either event, he cannot prejudice the right of the party entitled in remainder; but, in the event of the statutory period expiring before the latter becomes entitled in possession, his claim becomes barred, not in consequence of any action of the party having the intermediate estate, but because the right had accrued to the testator, the party through whom he claims, more than twenty years before he became entitled.

I cannot say that I express this opinion without hesitation, because two of my learned brothers, who have had great experience in such questions, and for whose opinions I entertain profound respect, have come to a different conclusion; but, after much reflection, it commends itself to my mind as a correct construction of the statute.

I am of opinion, therefore, that the appeal should be dismissed with costs.

PATTERSON, J. A.—Thomas Gray, the plaintiff, claimed title under the will of his father, James Gray. McConnell, who defended as landlord of Richford, claimed title by conveyance from John Gray, dated 31st March, 1862, to Adam Gray, under whom McConnell held, and also by length of possession in Adam and himself.

At the trial it was shewn that James Gray, the father, had gone into possession of a tract of land including the land in question about 1830, and had afterwards given deeds of portions of the land to his sons, except Adam. A well settled rule of evidence requires us to hold that he was seized in fee. He put Adam in possession of the land now in question, which was intended to be Adam's share, but would not give a deed of it, preferring to keep the title in himself, and intending to devise it to Adam. He did make a will in Adam's favour in 1848, and Adam, after his father's death, registered that will; but he made another



will in 1857, devising the land to his son John in fee, with an executory devise over to the plaintiff, in the event, which happened, of John dying without issue surviving him.

The possession relied on by the defence is the possession of Adam from 1847.

Assuming that Adam went in as tenant at will to his father, the defendants claim a continuous possession under the statute from a year after his entry.

The learned Judge, who tried the case without a jury, found against the possession, and in favour of the contention that Adam's possession was the possession of his father and not possession against his father; and upon that view entered a verdict for plaintiff, whose title under the will did not admit of dispute.

The verdict was moved against, and the plaintiff seems to have contented himself with supporting it on the view which had prevailed at the trial as to the character of Adam's possession; and, as noted by the learned Chief Justice of the Common Pleas, raised no question as to the effect of a deed which in 1862 Adam had taken from John, who then had the fee under the will. That deed had been proved at the trial, was in fact the same mentioned in McConnell's notice of title.

The Court, taking a different view of the evidence of possession from that taken at the trial, made absolute the rule to enter a verdict for the defendants.

On the appeal it has been contended, that Adam not having acquired a title by possession in 1862, the effect of his taking the deed from John was to make his possession rightful, and to stop the running of the Statute of Limitations.

I feel no doubt that this view ought to prevail.

It is unnecessary to discuss the evidence of possession. We may assume that the defendants' view is incontrovertible, and that Adam had held against his father from 1847 till 1857, and against John from 1857 till 1862.

The right of entry was in 1862 vested in John, and John conveyed it to Adam.

The doctrine that the statute having once begun to run continues to run applies only to disabilities. It continues to run although the person entitled may be under disability, but not after the person entitled enters. There is no question of disability here, and the person entitled was the very person who was in possession.

To use the words of Parke, B., in *Smith v. Lloyd*, 9 Exch. 562, there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute.

Here the possession for which the protection of the statute was invoked was not the possession of another than the person who had the right. It was from 1862 the possession of the only person who had the right.

But apart from the operation of the Statute of Limitations, the defence would, in my opinion, fail, on the principle that a person who obtains possession under the operation of a will will not be afterwards permitted to say that he held under a different title. I might refer to cases which exemplify this doctrine, such as *Hawksbee v. Hawksbee*, 11 Hare 230; and *Kernaghan v. McNally*, 12 Ir. Chy. Cas. 89; but it is so well illustrated by the late case of *Board v. Board*, L. R. 9 Q. B. 48, that I cannot do better than quote the judgment of Blackburn, J., which states the facts of the case as well as the rule of law.

"Robert Amesbury was tenant by the curtesy, and consequently when he died he had nothing to devise. Joseph Amesbury was the heir-at-law, and, but for the Statute of Limitations, would be entitled to the estate. Robert Amesbury, however, made a will, leaving the property to Rebecca for life with remainder to William in fee. Rebecca entered into possession and enjoyed the property under the will, paying the legacies and annuities, and in every way clearly shewing that she continued in possession because she was devisee under the will. She lets the defendant into possession, and he being privy in estate to her is subject to all the estoppels that would

have estopped her. Then the question is, whether Rebecca, having taken under the will which gave her an estate for life, is not estopped from saying that, as against William or the person claiming under him, the will, under which she came in as tenant for life and William was remainderman, is void. She cannot be allowed to assert that, although she was let in and enjoyed under the will, nevertheless it was void, and that the heir-at-law, Joseph, is entitled to the land, and as twenty years have run against his title he is barred, and she, having acquired the fee by twenty years undisturbed possession, can prevent William taking under the will. Rebecca claimed under the will and retained possession under the will, and she as against everybody interested in the will is estopped from denying its validity. The case is like that of a tenant coming in under a landlord; he is estopped from denying his landlord's title. \* \* My brother Martin in *Anstee v. Nelms*, 1 H. & N. at p. 232, says that the Statute of Limitations can never be so construed that a person claiming a life-estate under a will shall enter, and then say that such possession was unlawful, so as to give his heir a right against a remainderman. That seems directly in point. It is good sense and good law."

In the case before us, Adam did not enter under John's deed. He was already in possession. He had, however, no title except under the deed. If he asserted any other title, it could in 1862 have been no other than as tenant at will, and his assertion of a subsisting tenancy would be fatal to his claim under the statute. He continued to hold under John's title, as shewn by the fact of his acquiring it, and by its assertion by the defendants in this action. Pursuing the analogy of the case of landlord and tenant, we find abundant authority that when a person is in possession without title and accepts a lease, he is estopped in the same way as if he entered under the lease. It was so in *Doe Bord v. Burton*, 16 Q. B. 806; it was so in *Doe Bullen v. Mills*, 2 A. & E. 20; and the principle has often been acted on in our own Courts, as in *Doe Radenhurst v. McLean*, 6 U. C. R. 530;

*Doe Boulton v. Walker*, 8 U. C. R. 571; *Drake v. North*, 14 U. C. R. 476; *Stewart v. Cameron*, 20 U. C. R. 193; and *Penlington v. Brownlee*, 28 U. C. R. 189.

In *Paine v. Jones*, L. R., 18 Eq. 320, Sir R. Malins decided that the Statute of Limitations gave title against the remainderman to the testator's widow, who had entered supposing she took a life-estate under the will, but who in fact took no estate, because the property did not pass by the will under the law then applicable, as it had been acquired after the date of the will. He expressly recognized the principle that, if persons have no other title than the will, they are estopped from denying the title of persons under the same will; and distinguished the case from *Board v. Board*, L. R. 9 Q. B. 48, and other cases, by the circumstance that the widow took no title under the will.

The difficulty, if there is any difficulty, in applying the principle of these cases to that before us, lies in the absence of any person against whom the possession could be held after Adam had acquired the title under the will: that in truth the position of the title in relation to the possession excluded the operation of the statute altogether. If the defendants could succeed in evading that obstacle, it would only be to encounter the estoppel that precludes them from setting up the statute against the title which the plaintiff derives from the same will under which they have themselves held possession.

I think the appeal should be allowed.

HARRISON, C. J.—This action was commenced by writ issued on 5th January, 1875.

The plaintiff claims title under the last will of his late father, James Gray.

The defendant Richford claims as tenant under the defendant McConnell, and the latter, besides denying the title of the plaintiff, asserts title in himself:—

1. By length of possession.



2. By deed from John Gray, dated 31st March, 1862, to Adam Gray, and by deed from the latter to himself.

Excluding from view for the moment the claim by length of possession, it appears that both plaintiff and defendant claim title under the same person, James Gray.

James Gray took possession of this and other lots as early as 1830. His son Adam, with his permission, afterwards took possession of the land in question. It does not appear that Adam paid rent to his father; and although the evidence shews that the father occasionally worked on the land, I think it may be inferred that for more than twenty-one years before the commencement of the action, defendant and those under whom he claims had exclusive possession of the land.

James Gray, the father, notwithstanding his discontinuance of possession, and the possession of the son Adam, on 30th January, 1857, made his will devising the land in question to his son John Gray, and on his death, without issue, to the plaintiff, Thomas Gray.

I do not think that Adam Gray, if defending, having entered under his father, can be permitted to say that his father was not seized, but may shew that the estate of the father afterwards in some manner became divested or extinguished.

Those claiming under Adam Gray are, in this respect, in no better position than Adam Gray himself.

The contention is, either that the father's title is extinguished by discontinuance of possession, or that Adam Gray by length of possession has acquired a title to the land.

When the father, in 1857, made the will under which the plaintiff claims, no more than twelve years had elapsed from the time Adam's possession commenced, so that at that time the right of entry of the father was still existing.

If nothing happened between that day and the commencement of this action to prevent the operation of the Statute of Limitations, the defendants' possession must prevail, and the plaintiff's title be extinguished.

The first section of Consol. Stat. U.C. ch. 88, declares that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person bringing the same.

The question is, when the right of entry under which the plaintiff claims first accrued.

That right is the right of James Gray, the former owner of the land, who was at one time in possession of the land, discontinued his possession, and was succeeded in the possession by his son Adam Gray, under whom the defendant claims.

It is provided by sub-sec. 1 of sec. 2 of the Statute, "that when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, when entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right is to be deemed to have first accrued at the time of the dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

The fact of the holder of a good paper title not having been in actual possession by himself or tenant for twenty years, so long as there is no other person in possession, is not enough to destroy the paper title, for the owner is constructively possessed so long as there is no other person in possession: *Doe Cuthbertson v. McGillis*, 2 C. P. 124; *McDonell v. McKinly*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Lloyd v. Henderson*, 25 C. P. 253. But it is not to be overlooked that the expressions "dispossessed" or "discontinued," are in the disjunctive, so that

one may by discontinuance have lost his right, although no other person can be said to have acquired a right to the property by possession—see *Doe dem Taylor v. Proudfoot*, 9 U. C. R. 503; *Butler et al. v. Donaldson*, 12 U. C. R. 255; or there may be a discontinuance as well of a constructive as an actual possession, according to the opinion of Mr. Justice Burns, in *Pringle v. Allen*, 18 U. C. R. 575.

But be this as it may, the law is clear, that where the person having the right of entry was once in actual possession, and afterwards discontinued that possession, the right of entry accrues from the time of the discontinuance, provided it be followed by the possession of another; and that twenty years thereafter, if there be no tenancy or written acknowledgment of title, the right of entry is gone, although the defendant in possession be not able to shew twenty years' continuous possession in himself, or connected possession with those under whom he claims: *Doe Corbyn v. Bramston*, 3 A. & E. 63; *Owen v. DeBeauvoir*, 16 M. & W. 547, 564; *Keyse v. Powell*, 2 E. & B. 132; *Tottenham v. Byrne*, 12 Ir. C. L. R. 376; *Kipp v. The Synod*, 33 U. C. R. 220.

In the latter case Richards, C. J., said: "The law seems to be well settled that the real owner, who has been out of possession for twenty years and more continuously, cannot maintain ejectment, though no one of the occupants for portions of the twenty years may have obtained a statutory title."

This, like the case now before us, was a case in which it appeared that a person, under whom the plaintiffs claimed, had been in possession and discontinued possession, and this distinguishes the case from *Lloyd v. Henderson*, 25 C. P. 253, where nothing of the kind appeared.

Either want of possession for twenty years after a discontinuance of possession (sub-sec. 1 of sec. 2), or possession for twenty-one years in the defendant or some person under whom he claims (sec. 7) is enough to defeat the right of entry as against the person in possession.

In either case, unless the right of entry be postponed under the operation of some of the exceptions in the statute, the title of the person out of possession would be extinguished. See per Lord St. Leonards in *Incorporated Society v. Richards et al.*, 4 Ir. Eq. 177, 197; S. C., 1 Dru. & W. 258, 288. See also per Lord Wensleydale in *Jakes v. Summer*, 16 M. & W. 39, 42.

The person in possession defending his title is in a much stronger position than if out of possession, seeking to regain possession. See *Doe dem. Carter v. Barnard*, 13 Q. B. 945.

Here the person setting up the possessory title after the father's discontinuance of possession is not only now in possession but claims under a person with whose possession his possession makes more than the whole period covered by the statute.

In such a case it appears to me, if the doctrine of estoppel do not apply, that, without a written acknowledgment of the title of his opponent or some allowance for disabilities, the possessory title must prevail.

The fifteenth section provides that "when any acknowledgment of the title of the person entitled to any land or rent *shall have been given to him*, or to his agent in *writing*, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, such possession, &c., shall be deemed, according to the meaning of this Act, to have been the possession, &c., of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last mentioned person, or any person claiming through him, to make an entry, &c., shall be deemed to have first accrued at and not before the time at which such acknowledgment, &c., was given."

The sixteenth section provides that "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the *right* and *title* of such person to the land or rent, for the recovery whereof such entry, distress, action, or



suit respectively might have been made or brought within such period, *shall be extinguished.*"

Where the right first accrued to a testator, the disability of his executory devisee to take proceedings for the recovery of possession of land during the existence of the estate in possession, is not one of the disabilities for which any allowance is made by the Act. See *Stackpoole v. Stackpoole*, 4 Dru. & W. 320; *Browne v. Bishop of Cork*, 1 Dru. & Walsh 700.

It cannot be held that the deed from John Gray (claiming under the will) to Adam Gray, dated 31st March, 1862, although executed by Adam Gray, is "an acknowledgment in writing of the person entitled to the land, &c., given to him, &c., under section 15 of the Act. See *Doe dem. Perry v. Henderson*, 3 U. C. R. 486; *Williams v. McDonald*, 33 U. C. R. 423.

Unless therefore it can be held that the acceptance of the deed from a person claiming under the will was, independent of the statute, such a recognition of the father's title as to estop Adam Gray from shewing that plaintiff's right of entry accrued more than twenty years before action, or of availing himself of the possession continuously in himself and those under whom he claims, the plaintiff's action must fail.

The Chief Justice of the Common Pleas in his judgment says that no question was raised in the Court below as to the effect of the deed of 31st March, 1862; but in the argument before us reliance was placed on the deed, as in some manner postponing the right of entry, or putting an end to the running of the statute from the day the deed was accepted.

If Adam Gray, instead of accepting a deed from John Gray, had accepted a lease or otherwise attorned to John Gray, so as to create the relationship of landlord and tenant, the argument of the appellant would be entitled to prevail. See *Morton et al v. Woods et al*, L. R. 3 Q. B. 458 S. C., L. R. 4 Q. B. 293.

But I am unable to understand on what principle of law the mere acceptance of a deed of the land for value from the person out of possession, and claiming under the will, by a person who previously held possession independently of the will, is to be deemed such a recognition of the title of the testator as to estop the person accepting the deed from afterwards shewing that the right of entry now set up accrued more than twenty years before action, and is now extinguished.

The receipt by the husband of an annuitant under a will of the annuity payable to his wife, was held only to operate as a recognition of the due execution of the will, and of the capacity of the testator to make a will, but not as an admission of the seizin of the testator in any particular premises: *Doe dem. Dayman v. Moore*, 9 Q. B. 555, 562.

But the Court will not permit a person to acquire possession of land under the operation of a will, and afterwards assert that his possession is antagonistic to the will: *Hawkesbee v. Hawkesbee*, 11 Hare 230.

Hence if a person having no previous possession enter under a will and is allowed to hold and continue as a devisee for life under a will, he may be precluded from asserting as against the remainderman under the same will that the testator, under whom they both claim, was seized: *Anstee v. Nelms*, 1 H. & N. 225, 228, 332.

Possession obtained under these circumstances operates not only for the person who goes into possession, but for all who claim under the same title: *Persse v. Persse*, 3 Ir. Ch. R. 210; *Kernaghan v. McNally*, 12 Ir. Ch. R. 89, 101.

In such a case a person purchasing from the person who entered under the will cannot, of course, as against the remainderman, be in any better position than the person under whom he claims: *Board v. Board*, L. R. 9 Q. B. 48.

But it appears to me that this class of cases is obviously and completely distinguishable from the case now before us.

In *Board v. Board*, L. R. 9 Q. B. 53, the class of cases of which it is the representative was likened by Bramwell, B., to the case of a tenant coming in under a land-

lord, whose title the tenant was thereby estopped from denying.

The foundation of the law of estoppel in such a case is the fact of the obtaining or retaining possession by the permission of the landlord, in which case, as against the outside world, the possession is that of the landlord by means of his tenant.

This is plainly inapplicable to the case where at the time of the original entry the person entering, instead of claiming a limited interest under some instrument, claims an independent possession in himself, a possession which, even before the expiration of the statutory limit, is transmissible by will or by inheritance. See *Clarke v. Clarke*, 2 Ir. C. L. R. 395; *Keeffe v. Kirby*, 6 Ir. C. L. R. 591; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

When the deed was made in 1862 by John to Adam Gray the title of the father had not become extinguished, because twenty years had not then elapsed, either from the discontinuance of possession by the father or from the taking of exclusive possession by Adam; but I cannot see why Adam should not be permitted to shew that before and at the time of the taking of the deed he was himself in possession claiming the fee, and that afterwards his possession so far ripened as to extinguish any other title than his own, and that under any circumstances, the title under which the plaintiff claims is gone. See *Paine v. Jones*, L. R. 18 Eq. 320.

When the deed was accepted by Adam, his possession, although *prima facie* evidence of seizin, was subject to the right of entry of his father or those claiming under the father, and for that reason he was willing to purchase the right of entry, so as to strengthen or confirm his possession; but it would be unreasonable to hold that by such a confirmation of his possessory title, either that there was less a discontinuance, or that the grantee lost the benefit of his possession or is precluded from setting it up for the purpose, if necessary, of defeating the plaintiff's title. In order to make the possession of Adam effective, it is not necessary



for defendant to shew that it was adverse to any one. Nor is it necessary in one view for defendant to shew that there was continuous connected possession in himself and those under whom he claims. In any view of the statute, the right of entry set up by the plaintiff accrued more than twenty years before action. In one view defendant succeeds by the strength of his own possession. In the other view he succeeds, because of the weakness of the plaintiff's title. The fact that Adam in possession at one time accepted a deed from a person out of possession claiming under the same title as the plaintiff would put an end to the grantor's right of entry, but could not, I think, have any greater or other effect. See per Montague, C. J., in *Partridge v. Strange*, 1 Plow. 88. See also, per Burns, J., in *Butler et al. v. Donaldson*, 12 U. C. R. 264.

It is said that there can be no possession under the statute unless there be somebody in possession, and somebody out of possession claiming title, as it were, adversely; but the question here is, not so much as to the possession of the defendant, and those under whom he claims, as to the want of possession by the plaintiff, or those under whom he claims for twenty years next before action.

Besides, the general language of Judges is always to be understood as referring to the facts of the case in which the language is used. Thus in *Nepean v. Doe*, 2 Smith's L. C., 7th ed., 580, it is said by Lord Denman, "Except in cases falling within the 15th section of the Act, the question is, whether twenty years have elapsed since the right accrued, *whatever be the nature of the possession.*" The learned Judge never meant to say that any possession—that of a tenant, for instance—would be sufficient, but that the possession need not be an adverse one. So when Lord Wensleydale, in *Smith v. Lloyd*, 9 Ex. 572, said, "We are clearly of opinion that the statute applies, not to cases of want of actual possession by the plaintiff, but to cases *where he has been out of possession and another in possession* for the prescribed time," all that the learned Judge meant to say was, that the legal owner never having been



in actual possession of the estate, was in the eye of the law in possession, provided another person was not possessed. He did not mean to say any more than had been previously said by Lord Kenyon in *Rex v. Mayor of London*, 4 T. R. 26, viz., "Where there is no actual possession in another person, the possession follows the property."

No such case as the present, so far as I can discover from the decided cases, has ever arisen. But it seems to me that either from the time of the discontinuance of possession by the plaintiff's father, or at most from the expiration of the first year, Adam was in no manner depending on his father as tenant at will or otherwise. His independent and exclusive possession began to run, and in my opinion continued to run till the creation of a new tenancy of some kind, which would not only put an end to his possession, *but put that possession in another*: *Day v. Day*, L. R. 3 P. C. 751, 763. The deed which he accepted in 1862 from his brother John, so far from creating the relationship of landlord and tenant, and making the possession of Adam the possession of John, made the possession of Adam, if possible, still more the possession of Adam. John could not, by reason of anything which then took place, oust Adam. There was, in my opinion, no attornment from Adam to John. There was no such recognition of the title of the testator as to avail the remainderman.

Nor was there, in my opinion, if necessary to decide the point, any weakening or lessening of the independent possession of Adam so as to prevent the running of the statute, which had commenced to run in the lifetime of the testator, and long before the making of the will. It was certainly not in the power of the testator by the making of the will to postpone the accrual of his right of entry. The right of entry accrued more than twenty years before action, whether we regard the case as one of discontinuance of possession or not. There is no acknowledgment in writing (under the statute) given by Adam to John. There is no allowance by the statute for the disability of the executory devisee. There is no such

acknowledgment of his title as independently of the statute to preclude the defendant shewing, either that there was discontinuance of possession for more than twenty years before action, or that defendant and those under whom he claims have had more than twenty-one years possession. On no possible ground does it appear to me, with great respect to those who differ from me, is there any legal objection to the judgment of the Court below. But, even if I had arrived at a different conclusion as to the law, I would not have felt it my duty, in an action of ejectment, to allow an appeal against a decision of the Court of Common Pleas on a point not relied on at the trial, not urged in the Court below, and for the first time pressed in the Court of Appeal.

It is contrary to my idea of the proper functions of the Court of Appeal, and I say it with all due respect to those who differ from me, to reverse without necessity a decision of the Court below on a point which the Court below was never asked to decide, and which is for the first time started after that Court has given its judgment on the grounds which were argued before it.

In *Oakes v. Tarquand*, L. R. 2 H. L. 325, 379, the Lord Chancellor said: "It is becoming very much the fashion to bring up points after the original hearing; I do not think it is right, or that it is a practice that we ought to encourage."

Whatever may be said in favour of such a course when recovery or defeat in the particular action will be final and irrevocable, nothing can, I think, be said in its favour where, as here, the action is ejectment and the result not conclusive between the parties.

In my opinion the appeal should be dismissed with costs.

Moss, J. A.—This case comes before us upon an appeal from a rule of the Court of Common Pleas setting aside the verdict for the plaintiff in an action of ejectment, and entering it for the defendants, the issues having been tried by Mr. Justice Galt, without a jury.

The plaintiff, Thomas Gray, claimed title under the will of his father, James Gray, dated 30th January, 1857.

The defendants claimed by virtue of possession for more than twenty years before the commencement of the action, and also by conveyances from John Gray, one of the testator's sons, to Adam Gray, another son, dated 31st March, 1862; and from Adam Gray to the defendant McConnell, dated 20th June, 1862, 26th April, 1868, and 15th September 1868.

Upon the evidence the learned Judge found that James Gray had, at the time of his death, acquired a title to the lot by length of possession; and that he died in possession, having made the will to which more particular reference will be made subsequently. He entered a verdict for the plaintiff, and assessed the value of the improvements made by the defendant McConnell.

The Court, with the concurrence of the learned Judge, reversed this decision, being of opinion that upon the whole evidence it seemed clear that Adam Gray was in actual possession of this land for many years before his father's death, and much more than twenty years before the commencement of the action. They were of opinion that, although it might be quite true that the father worked on it down to a short time before his death, this was, upon the evidence, quite consistent with Adam's exclusive possession as owner. They thought that there was very fair evidence of nearly thirty years' possession in Adam and those claiming under him, and that a jury would certainly have found such a possession with a proper direction, and that the fair inference from all the facts is in its favour.

The judgment of the Court turns wholly upon the length of possession and its character. No argument seems to have been addressed to the Court nor any question raised upon the effect of the deed of 31st March, 1862, from John Gray to Adam Gray.

If this appeal could now be confined to the mere question of the time at which the statute began to run, we would have been warranted in declining to interfere with a con-



clusion which, although one of mixed law and fact, could certainly not be said to be unsupported by the evidence, and had been arrived at with the approval of the learned Judge who saw the witnesses.

But it is made one of the grounds of appeal that, even if Adam Gray had possession as against his father before his death, he had not acquired any title by length of possession on the 31st March, 1862, and that by the deed of that date the operation of the statute was intercepted.

This argument, which is still open to the plaintiff, although not advanced in the Court below, and to which, if well founded, we cannot, in my opinion, refuse to give effect, renders it necessary to consider the evidence with the view of determining the consequences of the acceptance of that deed by Adam Gray.

The necessity for this examination arises from the circumstance that it is argued that when he executed that deed John Gray was entitled to the land in fee simple, with an executory devise over to the plaintiff, by the will of James Gray, under which the plaintiff claims, and that the acceptance of the deed made the defendant's possession rightful and stopped the running of the statute, because no action could have been brought to eject him until after John's death.

It may also depend upon the character of Adam's possession, and the nature of the relations subsisting between him and his father, whether the latter had any devisable interest in this land in 1857.

There are, however, two objections brought forward by the defendant, which it will be convenient to consider in the first instance.

It was strongly pressed upon us that the plaintiff must fail, because he claimed the land as devisee of James Gray, and asserted title in James Gray by length of possession, while the evidence was insufficient to establish such a title. The point made was, that James Gray's possession did not commence earlier than 1830: that the evidence shewed that he did not retain the exclusive possession later than 1847: that therefore he had never acquired a statutory



title ; and that as he had neither a paper title nor a title by possession, the plaintiff had failed to prove title sufficient to maintain the action.

This seems to me to rest upon a misapprehension of the nature of the plaintiff's claim. He did not set up that the land was vested in his father by any particular title. He simply claimed title under a will made by his father. All he undertook by this notice was to prove that his father had in some way a title which had passed to him by this will, and was such as to entitle him to maintain the ejectment. For proof of his father's title he relies, not upon length of possession, but upon the presumption of seizin in fee arising from the fact of his father's prior possession. There is no doubt that his father was in possession prior and up to the time that Adam's possession commenced.

It is clearly settled by the series of cases following *Doe Hughes v. Dyeball*, M. & M. 346, that this is *primâ facie* evidence of title as against Adam and those claiming under him.

If James Gray had brought ejectment against Adam, he would have made out a *primâ facie* case by simply showing this prior possession ; and would have thrown upon Adam the onus of explaining the character of his possession. The character of this rule is well exemplified by the decision in *Eccles v. Paterson*, 22 U. C. R. 167.

The other objection to the plaintiff's title was, that, if James Gray was seized in fee, the effect of his will was to devise this land in fee simple or in fee tail to John Gray, and that the conveyance from him to Adam Gray and from the latter to the defendant, vested the estate in the defendant.

This point was not much insisted upon at the argument, and indeed does not appear to be open to discussion, as the terms of the will are undistinguishable in legal effect from that interpreted by the House of Lords in *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

That decision shows that under the will here in question John Gray took the land in fee, with an executory devise

over to the plaintiff in the event that happened, of John dying without leaving issue living at the time of his death.

In examining the evidence I think we ought to accept the conclusions as to specific facts which the Court may have drawn, and confine our attention to the legal consequences resulting from these and other established facts upon which the Court did not think it necessary to pronounce, in the view of the case that alone seems to have been presented for their consideration in argument.

Adopting that rule, I think that the following is a recapitulation of all the facts that can possibly be material.

James Gray, as was found by the Court, went into possession of the land in dispute as far back as 1830. As the learned counsel for the defendants pointed out, it is a just inference from the evidence that he went into possession of a tract of about five hundred acres, consisting of the west half of lot 12, and the whole of lots 13 and 14. It is the east half of 13 with the broken front which is in controversy. Three of his sons, John, Andrew, and Adam were residing with him after he took possession, Adam being then 13 or 14 years of age. The father does not appear to have ever lived on the east half of 12, but his residence was on the west half. Adam resided with him until 1847 or 1848, or perhaps later, when he built a house and barn on the east half, and moved there. The father and sons seem to have been working together on the lands of which the father had taken possession. In addition to the sons already named he had two others, William and the present plaintiff, Thomas. It is quite clear that the object which the father had in view was to bestow 100 acres on each of his sons. This is shewn by the evidence of William Gray, who was called by the defendants, and whose statements as reported by the learned Judge are so material that they are worth reading *in extenso*. He said: "My lot is the west half of 12: Adam was in possession of the east half of lot 13 from 1845 to 1860: my father, my brother Andrew, and myself were all working together on both the east half and west half. Notwithstanding we all

worked together, each had his own 100 acres. Adam would get the crop off the east half; John would get the crop off the west half. Tom had 100 acres of lot 14, and Andrew also a 100 acres of lot 14. My father paid for the land." On cross-examination he testified: "John and Adam and the old man were working pretty much all together up to the old man's death. They had to do as the old man ordered them. My father gave me a deed. He gave John a deed. He gave Thomas a deed, and Andrew a deed. He kept the east half of 13 for himself." On re-examination he said: "I got my deed in 1845 or 1846. We got them all at the same time. None was prepared for Adam. My father wanted to keep 100 acres for himself." It was proved that the father used to speak of this land as "our Adam's."

In 1846 a witness, who had been sent by John to his father with reference to the purchase of wood from this land, was referred by the father to Adam, with whom the witness made the bargain. On 10th October, 1848, the father made a will devising this land to Adam, and containing the clause: "This considered to become in force after the decease of my wife and myself." In 1849 Adam was assessed for taxes as the owner of this lot. On 30th January, 1857, James Gray duly executed the will under which the plaintiff claims, the effect of which was to revoke the devise to Adam, and to make the dispositions which have already been explained. The testator died about August, 1857; and on the 22nd day of October, of the same year, Adam registered a memorial of the first will, presumably in ignorance of the existence of the second will, which was not registered until 28th August, 1858. On 31st March, 1862, John Gray, by deed containing absolute covenants for title, conveyed this land to Adam Gray, who also executed the conveyance; and he, on 15th September, 1868, conveyed to the defendant McConnell in fee. John Gray died in 1874 without lawful issue, and this action was commenced on 5th January, 1875. The defendant McConnell had purchased the rear 50 acres of



this land from Adam on 26th April, 1858, and received a deed, but he afterwards made a reconveyance. He says that at this time there was a dispute between John and Adam about the title: that Adam told him "that the land came from his father, the same as the rest of the brothers. He said his father gave it to him and afterwards made a will of it to him." From the evidence of one of the testator's grandsons, when recalled by the defendants to prove the date of building the house and barn, it appeared that the house was built in 1850, and the barn previously—both under a contract with Adam Gray, who was to pay the witness, but the building was, he thought, put where his grandfather wished it to be.

I think a survey of these facts warrants the following inferences:—That James Gray intended to give this land to his youngest son, Adam, being about the same quantity as he had given each of his elder sons: that he did not intend to part with the ownership during his own life, but designed to leave it by his will: that he did not intend to denude himself of all his land during his life, but wanted, to use William's expression, to keep 100 acres for himself, that is, during his life: that in 1845, and I think in all probability at the same time that deeds were executed to the other sons, Adam was treated by his father and the other members of the family as in possession of this land, under the expectation that the title would ultimately be vested in him by devise, but without his father having given up or intended to give up his legal control; that he actually took up his residence on this land between 1848 and 1850, but that it continued to be worked jointly with the west half by him, his father, and John, until near the time of the father's death: that he deemed himself to be in possession by virtue of his father's promise: that he relied upon receiving a title at his father's death, and believed he had done so by the first will, under which belief he had it registered: that a dispute respecting the title arose between him and John soon after his father's death, in consequence of the unexpected production of the second



will : that he accepted a deed from John, which the latter could only have assumed to make under the second will, and executed the deed himself.

If these inferences be well founded, they effectually dispose of any pretence on the part of the defendants to dispute the original title of the testator. Adam Gray entered under him. It was the title which he believed he had received from him, firstly by an imperfect gift, and secondly by will, which he claimed when first dealing with the defendant McConnell. He entered by the license of his father; and *Doe Johnson v. Baytrip*, 3 A & E. 188, shews that he was estopped from denying his father's title, in the same manner as if there had been an ordinary demise to him.

It was argued strenuously that, considering the relationship of the parties, the manner in which the land was worked and the control exercised by James Gray, the statute never began to run against him.

*McArthur v. McArthur*, 14 U. C. R. 544 ; *Orr v. Orr*, 31 U. C. R. 13, and similar cases cited on behalf of the plaintiff, might, under other circumstances, entitle this question to serious consideration. But in my view it is unnecessary, because I rest my judgment upon the effect of the acceptance by Adam of the deed from John in 1862. He must after that, I think, be deemed to be in under this lawful title. At the date of that deed he had certainly not acquired any title by length of possession. He was liable to be ejected by John, who had been claiming his right under the will in his favour. It is reasonable to suppose that if he had not made some arrangement with John this right would have been effectually asserted by action. The plaintiff had no remedy either at law or in equity until John's death, for until then Adam and those claiming under him had an incontestable right to the possession. From the date of the deed the possession of Adam or his privies in estate ought, in my opinion, to be treated as John's possession. If the testator had been alive at the date of this deed, the title would have been in him as

against Adam. Being dead, the title was in his devisees. If John had, as he might have, recovered in ejectment against Adam in 1862, just before the date of the deed, the plaintiff's title could not have been barred by the statute, no matter how long John had lived, for the words, "other future estates or interests," in sub-sec. 3 of sec. 2 of the statute, comprehend all executory devises: *James v. Salter*, 3 Bing. N. C. 554; *Doe Dayman v. Moore*, 9 Q. B. 554; *Sugden* R. P. 22. The same consequences would have followed if he had actually ousted Adam in any manner.

I assume, as clear law, that if Adam had not accepted from John the deed in question, the statute would have continued to run in his favour, and the executory devisee would have been barred.

That introduces an apparent anomaly, but, unless I mistake, makes the very distinction on which the decision of this case hinges. If Adam had chosen to rest upon his possession merely, and had been fortunate enough not to be disturbed for the remaining years necessary to complete the statutory period, the bar would have been effectually interposed against every one claiming under the testator.

Can he set up the bar, after having accepted a deed from the person entitled to the immediate possession, on the strength of which he could remain in beyond the possibility of ouster until the twenty or twenty-one years had elapsed?

Without at all overlooking the principle that a person claiming by right of possession can insist that the effect of the statute is to extinguish the title of the dispossessed owner, and to leave the occupant with a title resting on the infirmity of the plaintiff's right to eject him, I think it will be found that if the defendant had *entered* under the deed in question, the answer to this enquiry is settled by authority.

In *Hawksbee v. Hawksbee*, 11 Ha. 230, upon the administration of an estate, Wood, V. C., was called upon to determine the rights in respect of a certain property which had been occupied by the testator for fifteen years before

his death without paying rent. He devised his estate upon trusts for the benefit of his wife and children, and gave his trustees power to lease or sell the house in question. His eldest son continued to carry on the business in the same premises, and paid rent for the house to the widow until her death, fifteen years afterward. The son then claimed a possessory title, and denied the title of the testator to devise the property by his will. The contention failed, on the ground that the defendant could not be permitted to obtain possession under the operation of a will, and afterwards say that he had acquired the property by a possessory title.

It became unnecessary to decide the point in *Anstee v. Nelms*, 1 H. & N. 225, but Martin, B., observed, and, according to the reporter's note, Pollock, C. B., seems to have agreed with him; "My impression is (if it were necessary to decide the point), that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give his heir a right against the remainderman."

This opinion is referred to in *Board v. Board*, L. R. 9 Q. B. 48, by Mr. Justice Blackburn, who characterizes it as good sense and good law.

Indeed *Board v. Board* would be an authority precisely in point, if Adam had been let into possession by John. The same principles would be clearly applicable to each case.

It is too clear for argument, I apprehend, that if John had obtained exclusive possession for any time, however short, that would have enured to the benefit of the executory devisee, and any person to whom John might then have conveyed, would have been in the same position as John himself, and would have been equally estopped from insisting upon the statute.

In the words of Mellor, J.: "It would be contrary to the wholesome doctrine of estoppel to allow a person who takes a limited interest in a will, after she has been in



possession for twenty years under the will, to convert her limited interest into a fee." The learned Judge of course means by setting up the possession against the rights of the person entitled upon the termination of the limited interest.

In *Randall v. Stevens*, 2 E. & B. 652, it was ruled, that if possession be taken by the person entitled *animo possidendi*, it is immaterial whether it be retained for an hour or a week. No matter how short the time, the bar of the statute is postponed.

In *Paine v. Jones*, L. R. 18 Eq. 320, Malins, V. C., while holding that a widow who was devisee for life had acquired a good title, to the exclusion of the remainderman, in a piece of property of which she had taken possession under the mistaken belief that it passed by the will, distinctly recognized the correctness of *Board v. Board*, which he distinguished.

Nor is there anything in the judgment in *Smith v. Stocks*, 20 L. T. N. S. 740, inconsistent with these views.

The question there was, whether the title of the defendant, as surveyor of highways, to a certain gravel pit and road to it, had become extinguished by the adverse possession of the plaintiff for more than twenty years.

It was argued that, even if the plaintiff by his tenants appeared to be in actual possession for more than the statutory period, the circumstance that the tenant occupying a part of the gravel pit had been elected surveyor for one year after possession had been taken made a difference. But this was negatived by the Court, and it was held that the possession he previously held being as tenant under the plaintiff, the character of that possession was not altered during his year of office.

But that seems no more than an affirmation of the principle enunciated by Sir J. Romilly in *Brown v. Gordon*, 16 Beav. 308, and exemplified in other cases, that it does not follow, because a man fills various characters at the same time, that the acts done by him in one of those characters have reference to or can affect him in another.



of those characters. That principle does not seem applicable to the present case on any ground that has suggested itself to my mind.

It does not appear to me that it ought to make any difference that Adam was already in possession. That possession was, or at least was liable to be made, wrongful as against the devisees under his father's will, but it was made rightful by the deed.

It is, I apprehend, a general principle, that possession which can be referred to a title which may be either rightful or wrongful, shall be referred to the rightful one. That certainly was the rule before the present Statute of Limitations.

For example, in *Conry v. Caulfield*, 2 Ball & B. 272, the attempt was made to set up adverse possession, but it appearing that the person asserting this position was the assignee of certain *elegits*, under which possession might have been taken, the Court refused to attribute that character to the possession upon grounds which on principle seem still applicable.

The Lord Chancellor said: "Why then finding that as assignee of these *elegits* he could hold the possession against the heir-at-law of Richard; and that as assignee of several other judgments, he could at any time defeat an ejectment, why am I to refer his possession to a wrongful title—a title by disseisin—there being a rightful possession by *elegit*; a possession which would defeat the ejectment of the heirs-at-law?"

Martin, B., said, in *Anstee v. Nelms*, 1 H. & N. 225: "Her entry must be considered as having been lawful, if the facts are not inconsistent with that construction."

I may refer to *Browne on Limitations*, at p. 77, and the cases there cited.

The nature of the possession held by Adam and his privies after the deed, seems to me to be quite opposed to the notion that it could be added to the previous possession so as to give the statutory right. It is true that the statute destroyed the whole theory of adverse possession, but it

implies that the possession should be held by a person against or to the exclusion of some person, or series of persons, entitled to the possession. Its general scope is that if a right of entry has existed for the prescribed period, and has not been exercised, it becomes extinguished. This implies that there was some person who could exercise such right of entry. In this case to whose exclusion did Adam and his assigns hold after the deed? Not to the exclusion of John, for they had his title; not to the exclusion of the plaintiff, for his right to possession had not yet arisen.

In *Smith v. Lloyd*, 9 Ex. 562, Parke, B., in delivering the judgment of the Court, said: "There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not to bring the case within the statute."

In *Lloyd v. Henderson*, 25 C. P. 253, this rule is stated to have been consistently observed.

It seems to me that in this case it cannot be held that there was absence of possession by the person having the right, for his assign, his privy in estate, was the person in possession after the deed to Adam.

Again, the holding which Adam had as against his father and the devisees was that of tenant at will.

Erle, C.J., has shewn, in *Locke v. Matthews*, 13 C. B. N. S. 753, that to satisfy the statute it must be the *same* tenancy for the whole twenty-one years.

To whom, it may be asked, was Adam tenant at will after he had obtained the deed?

It may be added that this view of the statute receives support from the language of Parke, B., in delivering the judgment of the Exchequer Chamber in *Rimington v. Cannon*, 12 C. B. 33: "The principle of the Act, generally speaking, is, to bar a person who has a right to enter, if he does not exercise that right in a certain time, not to bar those who cannot exercise that right—'*contra non valentem agere non currit præscriptio*.'"

I have not overlooked the case of *Kipp v. The Synod*,

33 U. C. R. 220, but it does not appear to me to decide the general proposition for which it is cited.

I have not the least idea that the Court there meant to hold that absence from possession for more than twenty years, *per se*, bars an owner of land. As I read the judgment, its whole effect is, that if the plaintiff has been out of possession, and other persons have successively been in possession, for more than twenty years, it is not necessary for the defendant to shew that he has acquired the rights of the prior holders. The misdirection consisted in telling the jury that it was necessary to prove twenty years' continuous possession in defendants, and *those from whom they claimed*. The ground on which the Court proceeded is thus explained by the learned Chief Justice: "The law seems to be well settled, that the real owner, who has been out of possession for twenty years and more continuously, cannot maintain ejectment, though no one of the occupants for portions of the twenty years may have obtained a statutory title."

This is in entire accordance with the principles which, in my opinion, entitle the plaintiff to our judgment. Here the real owner has not been out of possession for twenty years. On the contrary, the real owner was in possession from the time the deed in question was made until John's death. Under that deed Adam became the real owner for the time being. An estate in fee simple was vested in him, subject only to the contingency of being divested in the event of John dying without leaving issue surviving. If John had left issue, the estate would have been absolute.

If Adam and his assigns were not the real owners until John's death, the land was simply without an owner—a proposition which I apprehend no one is prepared to accept.

I desire to add that I am wholly unable to subscribe to the doctrine which the learned Chief Justice of the Queen's Bench has propounded respecting the duty of an Appellate Court in such a case as the present.

In my judgment the Court is not warranted in refusing to listen to an argument, simply because it had been overlooked by counsel or for some other reason failed to attract

attention in the Court below. Where the effect of the point might have been altered by the production of further evidence, it is only reasonable to refuse to permit it to be suggested for the first time in appeal; but it is not, and could not be, argued that the effect to be attributed by the law to the taking of this deed could be altered upon another trial at *Nisi Prius*. The defendants themselves assert title under the deed on the theory that John took an estate tail under the will. When this point is decided against them, I see no injustice in permitting the plaintiff to refer to the effect which this deed has upon the running of the statute.

In *Grand Junction R. W. Co. v. Bickford*, 23 Grant 302, the principles are stated by which this Court thought it should be guided, under such circumstances, and I perceive no reason for doubting their correctness.

This case seems to me to precisely resemble *Fitzmaurice v. Bayley*, 7 H. L. C. 78 while I find no difficulty in distinguishing it from *Oakes v. Turquand*, 2 L. R. H. L. 325, in which it was not until after the law Lords had pronounced their judgment that counsel suggested for consideration the new question which led to the remarks by Lord Cranworth.

I think the appeal should be allowed, with costs; and that the rule in the Court below should be discharged, but, as a penalty upon the plaintiff for omitting to raise the point there, without costs.

The Court being divided, the judgment of the Court below was affirmed, and the appeal dismissed, with costs.

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## MCLEAN v. DUN ET AL.

*Mercantile agency—Representation as to credit—Action for—C. S. U. C. ch. 44, sec. 10—Measure of damages.*

The defendants, who carried on the business of a trade protection society, in consideration of a yearly subscription, undertook to procure and furnish the plaintiff, a merchant in Toronto, to the best of their ability, with information of the mercantile standing and credit of the plaintiff's customers, among the merchants, traders, and manufacturers throughout the United States and Canada (in the communities wherein they respectively resided), for the purpose of aiding the plaintiff in determining the propriety of giving credit. On the 10th June, 1875, the plaintiff sent his clerk to the defendants to ascertain the mercantile standing and credit of one W., residing and doing business in Toronto, who had applied to him to purchase goods on credit. The defendants' clerk read out of a book to the plaintiff's clerk—that W. had stock about \$10,000, and \$5,000 or \$6,000 in his business, and claimed to be worth \$7,000: that his character and habits were goods: that he was doing a fair trade: and that his credit was good locally. The plaintiff, relying on this report, which had reference (to the knowledge of the plaintiff) to the information which the defendants had collected on the 29th April previously, and without making any further enquiries, sold to W., about twelve days afterwards, \$500 worth of goods on credit. W. was really insolvent at the time that the report was made, and on the 8th July following absconded without paying the plaintiff.

The jury found that the defendants did not furnish the information to the best of their ability, and that the plaintiff did not act imprudently in not making further enquiries.

*Held*, reversing the judgment of the Queen's Bench, HAGARTY, C. J. C. P., dissenting—that the defendants were not liable for the loss which the plaintiff had sustained, for that the action was brought upon or by reason of the representation, which was not in writing and signed by them under C. S. U. C. ch. 44, sec. 10, and was therefore not receivable in evidence; and the fact that the representation was made in pursuance of a contract did not prevent the application of the statute.

*Held*, also, that under the circumstances the plaintiff was only entitled to nominal damages for the breach of the contract to procure and furnish the information.

APPEAL from the judgment of the Court of Queen's Bench, discharging a rule *nisi* to set aside the verdict for the plaintiff, reported in 39 U. C. R., 551. The pleadings and facts are sufficiently stated there and in the judgments on this appeal.

The following were the appellant's reasons of appeal:—

1. The declaration was not proved, in this, that the contract or agreement alleged was that the defendants (the appellants) were to furnish, to the best of their ability, information of the mercantile standing and credit of the customers of the

plaintiff (the respondent) among the manufacturers, merchants and traders throughout the United States and Canada, concerning whom the plaintiff should have occasion to make inquiry, in order to aid the plaintiff in determining the propriety of giving credit; and the evidence established that Ernest M. Wilson was not a customer of the plaintiff. There was, therefore, no duty arising under the contract to furnish information respecting the standing or credit of the said Wilson, and the information furnished as to him was not within the contract.

2. The contract alleged was, to furnish to the best of defendants' ability the information sought; and the evidence established—not a request to perform the contract—but that the plaintiff requested the defendants to give whatever information they had respecting the standing and responsibility, etc., of the said Wilson. The defendants were not asked or required to procure information, but simply to give what they had; and it is not contended in fact, or shewn by evidence, that defendants did not state truly the information they had.

3. So far as the plaintiff is concerned, the defendants were not, under the agreement, bound to procure information respecting the said Wilson without being requested so to do, as they could not know that the plaintiff would require information concerning him until requested to furnish it, and the information given being truly what they had, its incorrectness—whether negligently obtained or otherwise—could not impose a liability on them to this plaintiff, the negligence in procuring not being in his service.

4. The contract was not evidenced by writing, signed by the defendants or any one authorized by them; and as the said agreement was by its terms to extend beyond a year, it required under the Statute of Frauds to be so evidenced: *Boydell v. Drummond*, 11 East 154; *Roberts v. Tucker*, 3 Ex. 632; *Dobson v. Collis*, 1 H. & N. 84; *Birch v. Earl of Liverpool*, 9 B. & C. 392; *Re Pentreguinea Fuel Co.*, 8 Jur. N. S. 706; *Farrington v. Donohue*, Ir. Rep., 1 C. L. 675; *Eley v. Positive, &c., Life Assurance Co.*, L. R., 1

Ex. D. 20; *Nicholls v. Nordheimer*, 22 C. P. 48; *Davies v. Appleton*, 25 C. P. 376.

5. It also required to be so evidenced as being of the nature of an undertaking to answer for the default or mis-carriage of another. If liability attached to the defendants because the said Wilson was not of good standing or credit, or possessed of stock to the amount reported by defendants, they virtually became answerable for him and any debt he might contract on their representation as to these matters, and they could only be so liable upon a written contract or agreement duly signed: 29 Car. II. c. 3, s. 4; *Forth v. Stanton*, 1 Wms. Saund. 211 a; *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664; *Green v. Creswell*, 10 A. & E. 453, 459; *Lee v. Mitchell*, 23 U. C. R. 314; *Merner v. Klein*, 17 C. P. 207; *Bond v. Treahey*, 37 U. C. R. 360; *Lexington v. Clarke*, 2 Vent. 223.

6. The defendants, if liable, are so by reason of their having made a representation concerning or relating to the character and credit of the said Wilson, to the intent that the said Wilson might obtain goods and credit thereupon from the plaintiff, and such representation was not in writing, and without writing no action can be maintained thereon. The contract was to furnish information to the best of defendants' ability, and having given the best they had they performed the contract, and their liability arises only by reason of the incorrectness of the representation. The action is, therefore, brought by reason of the representation, and not by reason of defendants' failure to furnish information—see breach laid in declaration: *Haycraft v. Ureasy*, 2 East 92; *Lyde v. Barnard*, 1 M. & W. 101; *Haslock v. Ferguson*, 7 A. & E. 86; *Swann v. Phillips*, 8 A. & E. 461; *Turnley v. MacGregor*, 6 M. & G. 46; *Tatton v. Wade*, 18 C. B., at p. 381.

To permit parties to enter into a contract to become responsible for representations concerning the character, credit, or dealings of any other person, without such representations being in writing, would be an evasion of the Statute, and would let in all the mischief intended to be



prevented both by the Statute of Frauds and by Lord Tenterden's amending Act, which were designed to prevent frauds by requiring certain contracts, and among others any contract of guarantee, to be in writing : *Per Lord Abinger*, C. B., 1 M. & W. 117 ; *Mallett v. Bateman*, L. R. 1 C. P. 163, 169.

The judgment of the Court of Queen's Bench is erroneous, in holding the action not to have been brought by reason of the representation, but by reason of the defendants' neglect to use due and ordinary care and ability in ascertaining the standing of Wilson. Without the representation, the want of due and ordinary care in ascertaining the standing would have been harmless. The plaintiff acted on the representation, and the manner of obtaining the facts in no way influenced his action.

7. Even assuming the view of the Court in this respect to be right, there was no evidence of neglect to use due and ordinary care in ascertaining Wilson's standing. There was no evidence of what ordinary or due care is in such a case. At all events, the weight of evidence was in favour of defendants. There was also evidence that the plaintiff did not act as an ordinarily prudent man in not making any further inquiries, in view of the facts that Wilson resided and carried on business in his immediate neighborhood, and was well known in the city, and that the goods were not furnished for a fortnight after the application. On these grounds the case should not have gone to the jury : *Bridges v. North London Railway*, L. R. 7 H. L. 213, 232, 233.

8. The damages, if the plaintiff is entitled to recover, should only be nominal, because the defendants' contract was not in terms to pay the debt of Wilson if he failed, nor did they undertake that he would not be dishonest and would not abscond. The evidence showed that he had the means of paying the plaintiff. It was of no consequence, therefore, whether he had a stock of goods worth \$10,000 or \$5,000 or only \$1,000. It was not shewn he was insolvent, and the damage or injury did not arise to plaintiff by reason of his not having a stock of \$10,000, but by reason of his



absconding without paying. If he had absconded with \$10,000 in his pocket without paying the plaintiff, though he did not owe another dollar, the plaintiff would have been entitled to recover his full debt, if entitled to recover it under the evidence in this case. And the statement of the proposition shows the impossibility of legally holding the defendants liable to this measure of damage, without holding that the contract was in fact an undertaking to pay the debt of Wilson on his failure to do so, and dishonestly absconding. If the plaintiff's cause of action arose from the defendants' neglect to use due or ordinary care in getting information respecting Wilson's standing, it was complete when the information was given to him, and he might have maintained an action then, but there can be no question but he could not then have recovered more than nominal damages, and if Wilson had the means of paying the debt when he absconded, the plaintiff can be in no better position, as to his right to substantial damages, than if he had commenced his action immediately after he got the information from defendants on which he credited Wilson: *Hutchinson v. Bell*, 1 Taunt., 558; *Cerbett v. Brown*, 8 Bing. 35; *Buckhouse v. Bonomi*, 9 H. L. Cas. 503; *Smith v. Thackeray*, L. R. 1 C. P. 564.

9. The damages are too remote: *Ashley v. Harrison*, 1 Esp. 48; *Taylor v. Neri*, 1 Esp. 386; *Greenland v. Chaplin*, 5 Ex. 243, 248; *Kelly v. Partington*, 5 B. & Ad. 645, 650; *Williams v. Reynolds*, 6 B. & S. 495; *Burton v. Pinkerton*, L. R. 2 Ex. 340; *Hobbs v. London & S. W. R. W. Co.*, L. R. 10 Q. B. 111; *Sanders v. Stuart*, L. R. 1 C. P. D., 326.

The defendants' rule *nisi* should have been made absolute to enter a non-suit or verdict for the defendants, pursuant to the leave granted at the trial, or to reduce the verdict to nominal damages, or for a new trial, on all or some of the grounds above stated.

The respondent's reasons against the appeal were :

1. The respondent contends that the judgment of the Court of Queen's Bench is right, and that the appeal should be dismissed, for the reasons mentioned in the said judgment.

2. The respondent contends that the action is one founded upon contract, and so not within the Statute, Con. Stat. U. C., chap. 44, sec. 10.

3. The respondent also contends that the contract was broken by the appellants, and the damages recovered were not too remote.

4. The respondent will rely upon the authorities cited in the judgment in the Court of Queen's Bench.

The case was argued in December, 1876 (a).

*M. C. Cameron*, Q. C., *C. Robinson*, Q. C., and *J. A. Boyd*, Q. C., for the appellants.

*Bethune* Q. C., *S. R. Clarke* with him, for the respondent.

The arguments will fully appear from the reasons for and against the appeal, and from the arguments in the Court below.

The following authorities were referred to in addition to those mentioned in the reasons for and against the appeal: *Jackson v. Spittal*, L. R. 5 C. P. 542; *Durham v. Spence*, L. R. 6 Ex. 48; *Haslock v. Ferguson*, 7 A. & E. 86; *Carrington v. Roots*, 2 M. & W. 248; *Hannan v. Reeve*, 18 C. B. 582; *Kimball v. Comstock*, 14 Grey 508; *Beeston v. Collyer*, 4 Bing. 309; *U. S. Telegraph Co. v. Wenger*, 55 Penn. 267; *Tatton v. Wade*, 18 C. B. 381; *Mallet v. Bateman*, L. R. 1 C. P. 163; *Reade v. Lamb*, 6 Ex. 130; *Addison on Torts*, 918; *Maxwell on Statutes*, 51; *Decolyar on Guaranties* 48; *Throop on the validity of Verbal Agreements* 174; *Browne on Frauds*, sec. 134.

March 17th, 1877 (a). HAGARTY, C. J. C. P.—In my judgment this appeal must turn wholly on the defence rested on the statute. The words are: "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given

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(a) *Present*.—HAGARTY, C. J. C. P., BURTON and PATTERSON, J. J. A., and BLAKE, V. C.

concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, *to the intent or purpose* that such other person may obtain money, goods, or credit thereupon, unless such representation or assurance be in writing, signed by the party to be charged therewith."

We have to inquire if this be an action to charge the defendants upon or by reason of such a representation. In one sense it may be said literally to answer that description. In another sense it is, to my mind, wholly outside the grasp of the statute.

I at once disclaim any intention to rest a decision upon any difference in the form of the action between *assumpsit* and case, and prefer ascertaining, if possible, the substantial claim sought to be enforced.

It is a contract for a valuable consideration to furnish to the best of the defendants' ability information of the mercantile standing and credit of certain of the plaintiff's customers, and the breach is, that the defendants did not exercise ordinary care and ability in ascertaining such mercantile standing and credit, setting out a report furnished by the defendants as to one E. W. incorrect and misleading, on which the plaintiff trusted him with goods and wholly lost the same.

Here there is a hiring and retainer to collect information as to the credit of third persons. The information is furnished, it is wholly incorrect, and the employer, trusting to its correctness, sustains loss.

It is certainly in a sense a claim to charge the person hired "upon or by reason of the representation." But does the law so define and limit the nature of the claim? It seems to me that the claim is rather for the breach of the contract to collect the information with reasonable care and diligence.

I cannot believe that the Legislature could have meant to extend the words used to cover a transaction of this character, and protect a person in the neglect or careless execution of an employment and business specially undertaken by him for value.

A doubt may well arise whether, even on a signed representation, any action as for a false representation, would lie against these defendants.

"It is settled law" (says Parke, B., in *Thom v. Bigland*, 8 Ex. 731), "that independently of duty no action will lie as for a misrepresentation, unless the party making it knows it to be untrue, or makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage." See *Behn v. Kemble*, 7 C. B. N. S. 260, and the authorities collected in 2 Smith's L. C. 88, notes to *Pasley v. Freeman*.

In *Lyde v. Barnard*, 1 M. & W. 114, Parke, B., very fully comments on the origin and effect of this clause: "It was stated at the bar, on both sides, and my learned brothers who have preceded me agree, that the mischief to be remedied was the evasion of the provision of the Statute of Frauds, that no one could be charged with the debt, default, or miscarriage of another, unless there was a note in writing signed by the party to be charged therewith; and I concur in that opinion. \* \* The practice of bringing actions on such parol representations was an evasion of the Statute of Frauds; and Lord Tenterden, (who framed the Act,) I think, meant to put all cases on the same footing, where one, on the personal credit of another, gave personal credit to a third, and to make it necessary that there should be a note in writing where such credit was given on the faith of a representation, as well as where it was given on the faith of a positive promise. I consider, therefore, the mischief to be this, and no more. \* \* I am of opinion that the statute applies only to those cases in which the representation is made, relating to the trustworthiness of a third person, *with the intent that he may obtain personal credit on the faith of such representation*. \* \* If we assume Lord Tenterden's object to have been merely to prevent evasions of the Statute of Frauds, as we think it was, and use this as a key for the construction of the clause, it would induce one to prefer the former alteration" (as to suggestions for reading the peculiar words of the



clause), "by which the clause is made clearly *to apply only to cases where the purpose of the representation is to obtain personal credit for the third person.*"

It may well be argued here that the information furnished by these defendants was in no sense to be regarded as furnished *with the intent that* Wilson should obtain personal credit on the faith thereof.

The information was collected as to him and numberless other traders in the course of defendants' business as proprietors of a kind of dictionary of reference as to commercial standing. It was neither their interest nor their design to induce the plaintiff to trust Wilson, or sell goods to him on credit.

If Baron Parke's explanation of the clause be correct, the case would probably fail, if based on the mere careless inaccuracy of the statement—there being no conscious falsehood, and no fraudulent intention, &c.

In this view of the alleged misrepresentation by defendants, the plaintiff's only remedy might be for a breach of a contract to furnish reliable information—reliable to the extent of being contracted to be prepared with reasonable care and diligence.

If the statute be a bar in such cases as this, the result must be as surprising to ordinary minds as it would be unjust.

I do not consider the case relied on by Mr. Robinson, *Haslock v. Ferguson*, 7 A. & E. 86, as affecting my view. There was nothing there but the false representation, no hiring, no duty, no breach of contract, express or implied.

If a man hire another for the express purpose of obtaining information as to the standing and credit of certain named persons, the individual employed would be certainly bound to use reasonable diligence in doing the work.

If he report to his employer without having made due enquiry, I think his liability rests wholly on his breach of contract, and his breach of duty is the proximate cause of damage resulting from his carelessness. He is not sued for making a false representation in the ordinary sense as men

understand false representations, but simply for his omission to do that for which he was paid, viz., the reasonably diligent and careful collection of information.

A merchant in extensive business might have a salaried clerk solely employed in making inquiries and reporting as to his employer's customers. He is sent to various places for that purpose. On his return he either verbally reports on each case, or perhaps enters in a book not signed by him the result of his inquiries as to the standing and credit of each. If he so report without reasonable care, I think there is certainly a remedy against him for his breach of contract, and not by an action for false representation.

A merchant might send his clerk or pay an agent to visit a port to ascertain if his vessel had safely arrived. The agent goes part of the way, and accepts a hearsay statement that she has arrived, and reports to his master that he has ascertained that to be the fact. The master on this omits to insure, which he otherwise would have done. I think the agent is liable for the loss caused by his neglect, and that it is a fallacy to urge that the statement he reports must be in writing, being that on which the master acted to his damage. Such a representation would not be within the statute, but illustrates the point as to the ground work of action.

A man may wish to invest money, and employs an attorney or other paid agent therefor. The latter reports to him that A. or B. wishes to borrow, and informs his employer that A. and B. are solvent, responsible parties, of good standing, capital, and credit perfectly safe, &c. On this the employer makes the loan. A. and B. turn out worthless, and the money is lost. It appears that the attorney or agent has really made no inquiries whatever, and knew nothing of their standing, &c. I think he would be responsible on a breach of contract to use due care and diligence, and that the fact that his employer acted on the unsigned representation so made as to credit and standing would be no defence whatever.

I also think that the measure of damage would be the sum lost by the agent's want of due care, &c.

Either the plaintiff should recover his actual loss or nothing. I cannot see how a recovery of nominal damage would be proper. Except where some right or principle is thereby determined, the recovery of nominal damages is hardly to be encouraged or extended beyond well defined bounds.

I see no medium course in this very peculiar case. The plaintiff ought to recover his substantial loss, or there should be a verdict for the defendants.

The rule as to the measure of damage is largely discussed in *Horne v. Midland R. W. Co.*, L. R. 7 C. P. 583, and in *Error*, L. R. 8 C. P. 137, at the last page: "The damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

I do not see any difficulty as to the contract not being performable within a year. On the face of the contract there is a specific payment in advance "for one year's service of the mercantile agency." The lapse of that time would, without further payment or agreement, I presume, terminate the bargain. A fresh payment would create a new bargain on the same terms, unless varied by agreement.

It is not on its face a fixed contract extending over a year. It is simply one for a year, renewable if the parties annually agree, and payment be made.

I have not thought it necessary to review the numerous cases cited.

It is unfortunate that we cannot find any information about the case of *Lloyd v. Perry*, noticed in the *Law Times*, August 1875, cited by Harrison, C. J.

It was tried at the Lincoln Summer Assizes. I gather from the notice that the statement as to the credit of the plaintiff's debtor was in writing, and probably signed by

the defendants: that the action was not for a false or deceitful representation, but for negligence; and that substantial damages were recovered. A fyle of the "Times" would probably give a fuller report.

I think the appeal should be dismissed with costs.

BURTON, J. A.—I agree with the learned Chief Justice of the Common Pleas, that there was ample evidence of the want of ordinary care and diligence on the part of the defendants in procuring and furnishing to the best of their ability information of the mercantile standing and credit of Wilson (in the community wherein he resided), and that the plaintiff is entitled to recover such damages as are the primary, natural, and immediate result of that breach of the contract; and in this respect only—that is, as to the amount of these damages—do I differ with very great hesitation from his conclusion, after an anxious consideration of the reasons which he advances in support of it.

The allegations upon which it was at first attempted to charge the defendants were not borne out by the evidence, and the plaintiff's counsel applied at the trial to amend, and it is, I think, to be regretted that the amendment had not been actually made, so that we might have discovered from the pleadings upon what precise grounds he finally rested his case.

This much, however, appears to be clear: that although the application to the defendants for information was made on the 10th June, it had reference (to the knowledge of the plaintiff) to the information which the defendants had collected and compiled on the 29th April previous.

It is to be noted also that the application requested the defendants to furnish such information for the purpose of "aiding us to determine the propriety of giving credit to Wilson," the person about whom the enquiries were made.

If the information so collected was insufficient to enable the plaintiff to come to any satisfactory conclusion upon the matter which prompted the enquiry, he had a ground of complaint against the defendants, and he would have



been entitled, I should say, to recover any expense which he necessarily incurred in obtaining the information which the defendants under their contract should have furnished.

So far there is no difficulty ; but why if the information was insufficient, and such as the plaintiff felt was not of a character to be acted upon, should he be entitled to recover more damages than those I have referred to ? Clearly he could not. But take the other position—that the statement furnished, though erroneous in point of fact, was sufficiently full to warrant the plaintiff, if he believed it, to act upon it.

The question would then arise, did the plaintiff, in reliance upon the information so given, give credit to Wilson, or did he not ? If he did not, he was not injured by anything the defendants had done or omitted to do ; if he did, then it becomes necessary further to enquire what the representation was upon which he acted ; and if he can establish in evidence that the information was false, and he parted with his goods upon the faith of it, there is no reason why he should not recover for any loss resulting from his having acted on such representation ; but the question then arises, is that representation within the statute ch. 44, Consol. Stat. U. C. sec. 10, so as to be inadmissible in evidence unless in writing.

The plaintiff, as his declaration was originally framed, alleged that the defendants represented Wilson's position on the 14th June, 1875, to be such that the plaintiff, believing it to be true and accurate, acted upon it within a few days thereafter—whereas it was admitted at the trial and upon the argument that the information had reference to his position not at that date, but in the previous month of April, which might be no guide to the plaintiff, without further information, in selling goods to him in July. If erroneous in that particular may it not be equally so in others, and seems to fall within the mischief intended to be guarded against by the statute.

Is it then an action brought “to charge any person upon or by reason of any representation or assurance made or

given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain money, goods, or credit thereupon, unless such assurance be in writing signed by the party to be charged therewith."

The learned Chief Justice of the Queen's Bench says it is in no sense upon the representation, but for breach of contract; but that does not appear to me to meet the point. Granting that the action is founded on the defendants' want of care in performing their contract, the plaintiff fails to shew any right to recover the damages awarded, unless he proves the representation, and that he acted upon it. To do this he is driven to prove the representation given verbally to his clerk, and if the statute forbids this, his action to that extent fails.

As before remarked, if the plaintiff did not furnish the goods in reliance upon such representation, there is an end of the enquiry. He has sustained the loss from the confidence which he has mistakenly placed in the customer, and not by reason of his having relied on the representation of the defendants; but if he did part with his property in reliance upon the representation made to him by the defendants, and which, as he says, was made with a view to his acting upon it, can it be plausibly urged that it does not come within the very terms of the statute, and is therefore not receivable in evidence, unless in writing and signed by the defendant?

The defendants deny that any such representation as alleged was made. It is shewn that the representation as originally alleged was untrue, and then it is proposed to prove that it is at all events true as a statement of Wilson's position at an antecedent period; but the statute says no such verbal evidence shall be received.

The law is, I think, very clearly established at the present day, as quoted by the learned Chief Justice from the judgment of Parke, B., in *Thom v. Bigland*, 8 Ex. 730, that "*independently of duty*, no action will lie for a misrepresentation, unless the party making it knows it to be

untrue, or makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage."

But the statute does not alter the law or give any right of action which did not previously exist; it merely provides that in all cases in which a party is attempted to be charged by reason of a representation of a certain character, the proof of that representation must be in writing and signed by the party.

It may be quite true, as the learned Chief Justice of the Common Pleas remarks, that it was neither the interest nor the design of the defendants to induce the plaintiff to trust Wilson or sell goods to him on credit. But is that material? If the communication is in reply to an enquiry as to the standing of a trader, to aid the applicant in determining as to the propriety of giving credit, and the applicant acts upon it and suffers damage—in such a case he is entitled to maintain an action, I should say, if the representation be fraudulent and false, apart, from any contract or duty, and whether it be fraudulent or not, if the party making the representation be under any contract to give the information, and is guilty of negligence in reference to it.

In the case of *Swift v. Jewsbury*, L. R. 9 Q. B. 301, the Court of Exchequer Chamber, whilst holding that the bank was not liable to an action for a false representation inasmuch as the letter containing it was signed by an agent, held the agent himself liable, although he had no knowledge whatever of the plaintiff in that case, much less that he was intending to give credit to the debtor.

The information there was sought by one bank from another as a mere matter of courtesy, no intimation being given as to the reasons for the enquiry, but merely seeking in confidence the manager's opinion of the respectability and standing of Sir W. Russell, and whether he considered him responsible for £50,000.

It was there neither "the interest nor the design" of the defendant that the plaintiff should give Sir W. Russell credit, but it must have been in his contemplation that it

would or might be communicated to the customer of the bank on whose behalf the information was sought, and that customer having acted upon it to his damage, the Court held that he was as much entitled to maintain the action for such damage as if the representation had been made directly to himself.

It is quite true that in that case the action was an action on the case for fraudulent misrepresentation, and that is the way in which the great majority of the cases which have arisen since the passing of the statute have presented themselves to the Court ; but the statute is not confined to fraudulent misrepresentation, although, *in the absence of duty or contract*, the action whereby the defendant would be sought to be charged would be sustainable only upon proof of a representation known to be false, or made with a fraudulent intention that another should act on the faith of it.

The learned Chief Justice of the Common Pleas suggests several cases, illustrative of the views which he entertains. Among others, he takes the case of a merchant employing a salaried clerk for the express purpose of making enquiries as to the people he could safely entrust with goods ; the clerk neglects his duty, and makes reports in a book kept for the purpose, as to the solvency or credit of the persons enquired about, which are untrue in fact, and his employer suffers damage by selling goods to such persons. I agree with him that the clerk would be liable to his employer if he could prove such a case ; but if the clerk should allege that he made no such representation, his employer might be met by the objection that the statute requires such representation to be in writing, and even if the clerk's own written reports are relied upon, the statute again interposes, as it not only requires it to be in writing but to be signed by the party charged. I am unable to see why that representation does not come as clearly within the statute as those made by parties under no obligation or contract to furnish the information.

If the clerk in such a case had not only falsely but



fraudulently made the report, and he was charged in an action for so doing, he would not be liable unless the representation was in writing. As it was, however, his duty to collect and furnish the information, it would probably be unnecessary to go the length of shewing that it was false to his knowledge or made with any fraudulent intent; but I do not see how we can say that he could be made liable for the representation unless we take upon ourselves to disregard the plain language of the statute.

In consequence of the different view entertained by the Chief Justice who has just delivered his judgment, and the two learned Judges in the Court below, I have come to the decision I have expressed with great hesitation, but after a very careful examination of the reasons advanced by them, I am unable to convince myself that evidence of the representation on which the plaintiff is represented to have acted is receivable, and am therefore of opinion that the damages are not the natural and proximate result of the breach of contract proved, and that the verdict for those damages cannot be sustained.

I think the appeal should be allowed with costs, and the rule made absolute to reduce the verdict to one shilling, with the option to the plaintiff of taking a nonsuit.

PATTERSON, J. A.—It was pressed upon us by counsel on both sides that the rights of the parties must be determined on the basis of their contract. For the plaintiff this has been urged as a foundation for the contention that the statute (Consol. Stat. U. C. ch. 44, sec. 10), which requires representations concerning the character, conduct, credit, ability, trade, or dealings of persons to whom credit is to be given, to be in writing, and signed by the party to be charged, does not apply, because the action is not upon the representation, but for defendants' default in not acting to the best of their ability in procuring information. And for the defendant it is argued that the fact of the representation being made under a contract does not prevent the application of the statute; and that at all events the

contract here was only to give such information as the defendants had.

Our first enquiry is, what was the contract?

It has to be gathered from the printed statement of the "terms of subscription." By that document subscribers say: "In consideration of the agreement entered into by the mercantile agency to *furnish to the best of their ability* information of the mercantile standing and credit (in the communities wherein they respectively reside) of our customers among the manufacturers, merchants, traders, &c., *concerning whom we have occasion to make enquiry*, in order to aid us in determining the propriety of giving credit, we do hereby employ the said mercantile agency to *procure and furnish to us the information aforesaid*, in accordance with the following rules and stipulations, and with which we agree to comply faithfully."

The only stipulations which it is important to note are the following: "All extended reports are to be read at their office to us, or to such confidential clerk as may be authorized by us to receive the same, subject to their regulations. And said mercantile agency shall prepare for our use, and place in our keeping a printed copy of a reference book prepared by them, containing ratings or markings of the credit of business men."

The reasonable construction of this document, which provides for the defendants "*procuring and furnishing* the information aforesaid,"—that is to say, the information which they were to *furnish to the best of their ability* of the standing and credit of customers—is that the defendants were to use at least ordinary care and diligence and skill in procuring information, and that on request they were to furnish or communicate the information so procured.

The defendants provide a printed form of application to be used by subscribers. It asks for whatever information the defendants have. The application in the present case was written on one of these blanks, and was complied with by reading the extended report concerning Wilson to the plaintiff's clerk, in the manner provided in the agreement.

The defendants cannot say that by the peculiar wording of this application a contract was created to give merely such information as they might happen to have. It must be read as an application made in terms of the agreement, and as asking for such information as, acting to the best of their ability, or with ordinary diligence and skill, they had been able to acquire. If this were not so, the agreement to furnish to the best of their ability information of customers concerning whom the subscriber had occasion to inquire, would be perfectly delusive.

The case of *Roe v. Bradshaw*, L. R. 1 Ex. 106, to some extent illustrates the force of such words as "the best of their ability." The question there was, whether the Bills of Sale Act, which required an affidavit to state the grantor's residence, was satisfied by an affidavit which stated the residence to the best of the deponent's belief.

Pollock, C. B., said: "I think, however, that a man who makes such a statement imports that he is entitled to entertain the belief he expresses, and that we must not take him to mean that the 'best' of his belief is no belief at all. The danger suggested by Mr. Chambers is, that a man may shelter himself behind a quibble, but I think that would turn out to be a mistake."

Bramwell, B., said: "It is said that the 'best' of a man's belief may be worth nothing. To this the Lord Chief Baron gives the true answer. A man who swears to the 'best' of his belief swears that he has a belief."

Mr. Cameron argued that two things were contemplated by the contract—namely, the keeping of a record of the standing of all business men, and the procuring of special information when required by a subscriber—and that in this case the request was not to procure special information. I certainly agree with this argument to the extent that the application did not require a special inquiry to be instituted, though I may not assent to the suggested construction of the words, "whatever information you have."

I do not think that the contract provides for or contemplates the making of special inquiries on applications



concerning particular customers. No doubt that might be done, and it might be necessary to do it if the application referred to some one concerning whom there was no recorded report. But looking at the contract only, it seems to have in view that the results of general inquiries are to be kept on record, and to be communicated on application; from these extended reports the reference book is compiled, and it is furnished to every subscriber. I do not think that the contract extends further than this.

Consistently with this view, we find that the key to the reference book, after explaining the letters and figures used to indicate the rating of the persons named, contains this note: "The absence of a rating indicates those whose business and investments render it difficult to rate them satisfactorily to ourselves. We therefore prefer, in justice to these, to give our detailed report on record at our offices."

The "detailed report" I understand to be what the form of application calls, "whatever information you have"; and this note properly treats it as the subject of special attention on the part of the defendants.

Then the information which was to be furnished to the best of the defendants' ability was to be in relation to the *mercantile standing and credit of customers*.

Mr. Cameron argued that Wilson was not a customer, because he had not yet bought any goods from the plaintiff. This rendering of the word would narrow the contract so as to exclude the cases in which information was most essential to aid in determining the propriety of giving credit. Fortunately neither usage, principle, nor authority requires it. It may be, as Mr. Cameron suggested, that the defendants confine their information to customers so that their communications may be privileged. But that protection applies in the case of one who has not yet made his first purchase. The character given of a servant is given, not to the master in whose service he is, but to the person with whom he wishes to engage.

If the true meaning or popular use of the word "customer" created any difficulty, which I do not think it



does, we can resort to the rule applied to the construction of the word "plaintiff" as used in the statutes 12 Geo. I., ch. 29, and 1-2 Vic., ch. 110. By those statutes, before a writ issued to arrest a debtor on a *ca. re.*, the *plaintiff* was required to make an affidavit. But there was no plaintiff, as there was no suit, until after the writ had issued. Therefore "plaintiff" was held to mean the person who intended to become plaintiff: *Schletter v. Cohen*, 7 M. & W. 389.

It is found by the jury that the defendants did not furnish to the best of their ability information of the standing and credit of Wilson.

The jury were not asked in what respect the defendants failed to exercise the necessary diligence, or skill, or care. It is perfectly clear that the information they are said to have given was very far from correct. It represented that Wilson had a stock worth about \$10,000: that he had \$5,000 or \$6,000 in the business: that his character and habits were good; and that his credit was good locally. It appears that he never had stock or money in the business to anything like the amounts stated, although he had had a valuable stock which would have fully justified the credit given him. There is not much reason to doubt that if every thing else had been right, the plaintiff would as readily have given credit to the extent of \$500 if the stock was worth \$4,000 or \$5,000, as if it was worth \$10,000. The fact was, however, that Wilson had been fraudulently disposing of his stock by auction, and when the defendants gave the information in question he must have got rid of all or very nearly all of it, as the subsequent auction sales, which seem to have included the plaintiff's goods, did not produce much over half the amount of the plaintiff's account.

It is, of course, possible that even with reasonably diligent inquiry the defendants might have failed to discover the fraudulent disposition of his stock, which Wilson would naturally use every effort to conceal; and they might also have found that his credit was better rather than worse,

as his bank account shewed increasing deposits, the money being most likely the proceeds of these sales; but the evidence warranted the jury in finding that the proper inquiries by competent agents had not been made, and also that the defendants had not procured information to the best of their ability, and the plaintiff is therefore entitled to retain his verdict, unless the action is brought to charge the defendants upon the representation, and the statute required this representation to be in writing and signed by the defendants.

I see no difficulty in holding that the application of the statute is not excluded by the mere circumstance that the representation is made in pursuance of a contract which requires a true representation.

Under the Statute of Frauds a promise to answer for the debt, default, or miscarriage of another must be in writing, even though the promise is upon a consideration moving from the creditor: 1 Wms. Saund. 233.

The statute deals with evidence only. It forbids a person who has sustained a loss from alleging that he gave credit on the faith of a representation of his debtor's circumstances or character, unless the very words of the representation appear in writing signed by the party charged.

This protection is as much needed by the man who gives his information for pay, as by one who gives it gratuitously. One is as much exposed as the other to the risk of misrepresentation, and the wholesome operation of the statute is as important in the one case, as in the other; although in some particulars which the statute does not deal with, the existence of a contract may be material, as perhaps in dispensing with proof of deceit in making the representation. See *Thom v. Bigland*, 8 Ex. 731, per Parke, B.

The value of the rule is illustrated in the present case by the evidence of the defendant, Wiman, who was called for the plaintiff, and who proved that the information which was given to the plaintiff on 10th June, was from

a report of 29th April : that the date was always mentioned to applicants ; and that they do not profess to bring information down to the date of the application.

It might have had a most material effect on the view taken by the jury, if it had appeared as a part of the defendants' written report, that the information they gave related only to 29th April. It might and probably would have caused the learned Judge who was trying the case to have asked the jury to answer specifically a further question, viz., whether the plaintiff gave the credit on 22nd June, in reliance on affairs continuing in the same state as on 29th April. It ought to have seriously affected the view to be taken by the jury of the subject of one question which was asked them, viz., Did the plaintiff act as an ordinarily prudent man in not making further inquiries ? And it certainly would have removed the impression which is expressly shewn by one of the questions left to the jury to have been that acted upon, that the information was given and received as relating to the day on which it was given.

My views may be shortly recapitulated thus : The contract is not one to provide special information or to make fresh inquiries on each application. It is to use care, diligence, and skill in procuring information which is to be recorded for the use of subscribers, and on application communicated to them. In other words, the defendants undertake to make a representation concerning the character, conduct, credit, ability, trade, or dealings of customers of their subscribers, and to embody in that representation information which to the best of their ability they have procured.

When an action is brought for breach of this agreement, if the charge is that they refused the information and would make no representation, the matter is simple, and it is not this case. If they make the representation, and the charge is, that it is misleading, and that by relying upon it a loss has been sustained, the first question, and the one without answering which it is impossible to move a step, is, what was the representation ?



It is right that a company having it in their power, either from design or from carelessness, to do very serious injury, should be held strictly, on every proper occasion, to the proof of their care and good faith in the performance of their self-imposed duties ; but for this very reason they should have the benefit of such safeguards as the law provides ; and one of these is the provision that they shall not be charged upon a representation which is not evidenced by a writing signed by themselves.

One contention for the plaintiff is, that the complaint is not for making an incorrect representation, but for failing to use due diligence in acquiring information. The actual statement contained in the defendants' books is shewn in evidence, and after hearing the testimony as to the way in which the information was acquired, and seeing the witnesses who were the persons who had been deputed by the defendants to make inquiries about Wilson, the jury found that proper diligence had not been used. But what is the effect of that finding? There is this dilemma. Either the plaintiff did not act upon the information because it was insufficient, and he is entitled to the damages which resulted from their not having had information on which he could act, which in this case could be nominal damages only ; or he did act upon it, and by so doing lost his money, in which case the statute interposes by requiring written and signed evidence of the representation on which he acted.

In the case of *Lyde v. Barnard*, 1 M. & W. 101, a singularly lucid and able exposition of the purpose and scope of the statute of which ours is a counterpart, was given by Parke, B., but I am not sure that it greatly aids our present discussion.

In that case the plaintiff complained that by an untrue representation of the charges upon a life interest in some trust funds he had been induced to advance money on the security of those funds. The Court was equally divided on the question whether that representation was within the statute, and Parke, B., combatted the application of the



statute to the case of advancing money upon securities, and maintained that it applied only where personal credit was to be given. The statute creating no right of action, and dealing only with evidence, when it is said that the representation must be made with intent that personal credit shall be given, I do not understand it to be intended that there must be a design to induce the person to give credit, or that one may not be liable although entirely indifferent whether credit is given or not, but merely that the giving of personal credit, as opposed to acting in any other way, in dependence on the information given, is what the statute deals with.

The learned Chief Justice in the Court below has referred to authorities which establish very clearly that the measure of damages may, in case of credit being given on the faith of a representation of the circumstances of a customer, be the amount of the credit given. And he has pointed out the principle that the damages to be recovered are such as were in contemplation when the contract was made; or, as he expresses it with reference to this case, "because the amount of the credit given was within the amount for which directly or indirectly it is said credit may be given."

What, in my judgment, has been overlooked in applying this principle is, that it was never contemplated that credit should be given except on the faith of the representation.

The assertion on which the liability to these damages rests is this: You may give credit within certain limits, because the circumstances of your customer are so and so. And this brings us again face to face with the statute.

I regret that there is a difference of opinion between the learned Chief Justice, who is now presiding and the other members of the Court; but after discussing the matter, and also after having had an opportunity of perusing the judgment he has just delivered, I am compelled to adhere to the opinion I have expressed.

I think the appeal should be allowed, with costs, and the rule made absolute, at the option of the plaintiff, either to enter a nonsuit, or to reduce the verdict to nominal damages.

BLAKE. V. C.—A perusal of the evidence makes it clear that the defendants were wanting in ordinary care and diligence in procuring information as to the standing and credit of Ernest M. Wilson. The failure on the part of the defendants to collect any or sufficient information as to Wilson, would not in itself be the direct cause of damage to the plaintiff, unless it be the expense the plaintiff might be put to in seeking from some other source for the statement with which the defendants should have supplied him. This amount, I presume, the plaintiff could recover against the defendants.

The injury in the present case arises from the defendants having given certain unreliable information to the plaintiff, as to the credit of another, on which he acted, and whereby he has lost the amount for which credit was given. There was by the defendants a “representation \* \* made \* \* concerning \* \* the \* \* credit \* \* of a person, to the intent or purpose that such other person” might “obtain goods or credit thereupon.”

Disguise it as we please, we cannot conceal the fact, that it was not until this representation was made that the cause of complaint, in respect of which the plaintiff seeks relief, arose. It was for the conveying of this false information, on which he acted, that he complains.

Let the case end with the non-compliance with the undertaking of the defendants to collect the needed information, or with the defendants collecting or compiling it untruthfully, and no substantial injury has arisen to the plaintiff from such conduct of the defendants.

There is yet a link missing, and that is not supplied until the standing of Wilson, as thus ascertained by the defendants, is made known to the plaintiff. But then the making this known to the plaintiff is the very “representation concerning credit” to which the Act refers, and in respect of which it declares that no liability arises unless it be supplied in the manner designated by the statute, namely, “in writing signed by the party to be charged therewith.”

This statute, relied on by the defendants, seems clearly to cover the present case, and I do not think we can get over its effect, except by adding to it a clause declaring that it shall not apply to dealings with such a mercantile agency as that represented by the defendants. I think this is an addition to the Act which, if made, must be by the Legislature and not by this Court.

The plaintiff should have liberty to take a verdict for nominal damages, or a nonsuit.

The appeal should be allowed, with costs.

*Appeal allowed.*

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WILEY ET AL. V. SMITH.

| Aff. 2 S.C.R. 1.

| Fol. 2 A.R. 8.

*Stoppage in transitu—Goods in bond.*

The plaintiffs, merchants in New York, sold to E. B. & Co. at Toronto, 250 barrels of currants on credit, and consigned the same to them in bond. A bill of lading thereof was duly received by E. B. & Co., who paid the freight thereon, and gave their acceptances for the price of the said goods, as well as for the cartage and American bonding charges. The goods, on arrival, were entered and bonded in the consignees' name, and placed in one of the customs bonded warehouses subject to the payment of the duties. E. B. & Co. sold and delivered 150 barrels, and the remaining 100 barrels were bonded under 31 Vic. ch. 6, D., in a portion of E. B. & Co.'s warehouse partitioned off and used by the customs authorities. Before the acceptances matured, and while the goods remained in bond, E. B. & Co. became insolvent.

*Held*, reversing the judgment of the Queen's Bench, that the *transitus* was at an end, and that the plaintiffs had lost the right to stop the goods.

Appeal from the Court of Queen's Bench.

THIS was a special case stated without pleadings.

The action was against the defendant, as assignee of the estate of E. Bendelari & Co., for the recovery of \$1,497.88.

The plaintiffs, merchants in New York, sold to E. Bendelari & Co., merchants of Toronto, 250 barrels of currants on credit.

On the arrival of the said goods in Toronto, a bond was given to the Customs' authorities for the same by E. Bendelari & Co. This bond recited, "Whereas the above bounden E. Bendelari & Co., have lately imported into the port of Toronto, in a ship or vessel called," &c., "from Suspension Bridge, the undermentioned goods, namely, 250 barrels of currants, &c., the duties in respect whereof have not been paid, and which goods we are desirous of disposing in warehouse No. 4, at the port of Toronto," &c. Then followed the condition.

One hundred and fifty barrels were sold and delivered by E. Bendelari & Co., prior to the insolvency hereinafter mentioned, to a purchaser at Hamilton. The remainder thereof, being 100 barrels, were bonded under 31 Vic., ch. 6, D, in a portion of the warehouse of the said E. Bendelari & Co., for which they paid rent, partitioned off, and used by the Customs' authorities as bonded warehouse No. 4. The said currants were shipped by rail from New York on the 7th of January, 1876, at the risk of E. Bendelari & Co., and they arrived here on the 12th of the same month. A bill of lading thereof was duly received by Bendelari & Co., who paid the freight thereon, and in the usual course of business gave their two several acceptances to the plaintiffs, (who were the unpaid holders thereof) dated the 7th day of January, 1876, and payable thirty days after date, for the price of the said 250 barrels of currants, and for the cartage and American bonding charges:

On the 31st of January last, the said E. Bendelari & Co. held a meeting of their creditors, and at such meeting informed them of their inability to meet their engagements in full, and the creditors agreed and demanded that an assignment under the Insolvent Act of 1875 should be made by the said E. Bendelari & Co., but the plaintiffs were not represented at the said meeting.

On the 7th February, the said E. Bendelari & Co., in compliance with the said demand, made an assignment under the said Act to the defendant, who accepted the same, and became and was duly appointed assignee.



On the 8th day of March last, the plaintiffs served on the collector of Customs at Toronto a notice and demand, of which the following was a copy:—

“We hereby notify you not to deliver to the consignees, Messrs. E. Bendelari & Co., or their order, or to the assignee, one hundred barrels of currants, consigned by Messrs. Wiley, Wicks, and Wing, of the city of New York, merchants, to Messrs. E. Bendelari & Co., of this city, the said barrels being marked “G.” or “G. C.,” and now stored in Her Majesty’s Bonded Warehouse No. 4, in this city, the purchase money for the same not having been paid, and the said firm of Bendelari & Co. having become insolvent before the said barrels of currants had reached their hands; but you are to deliver the said barrels of currants to ourselves or to our order forthwith.

“Yours truly,

“O’DONOHOE & MEEK,

“Attorneys for Wiley, Wicks, and Wing.”

On the 9th of March last, the plaintiffs served on the said collector two other notices, demanding the goods, and at the same time tendered him the duties thereon, and offered to indemnify him against the consequences of the delivery of the same to them, but the collector refused to consent to their delivery to the plaintiffs, on the ground that they had been claimed by the defendant as assignee.

The question for the opinion of the Court was, whether, under the circumstances and facts aforesaid, the plaintiffs were entitled to a delivery to them, as against the defendant, of the said 100 barrels of currants as having been duly stopped *in transitu*.

If the Court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs for \$1,497.88c., and interest thereon from the 1st March last, and costs of suit.

If the Court should be of opinion in the negative, then judgment of *nolle prosequi*, with costs of defence, was to be entered for the defendant, and an order was to be made that the defendant be at liberty to apply any moneys coming to the plaintiffs by way of dividend out of said

estate, on account of the costs adjudged to him so far as the same would go.

The case was heard before Mr. Justice Galt, sitting for the full Court, and was argued together with the case of *Graham v. Smith*, in which the same questions arose.

May 30, 1876. *O'Donohoe*, for the plaintiffs.

*Foster and J. B. Clarke*, contra.

June 28th, 1876. GALT, J.—This case is the same as *Graham v. Smith* (a), and the decisions must be the same, the only difference being, that in this the plaintiffs are holders of unpaid acceptances; but that makes no difference.

The law on the subject of stoppage *in transitu* has been fully discussed by Richards, C. J., in the case of *Lewis et al. v. Mason*, 36 U. C. R. p. 590. That case, however, differs from the present in this important respect, namely, the goods were in the customs warehouse under bond given by the vendor, while here they were bonded in the name of the consignee.

The learned Chief Justice, after referring to all the authorities, and particularly to the case of *Strachan v. Knox Trustees*, 19 Fac. Coll. 253. which is very similar to those now under consideration, says:—

“Here, however, there is an obvious distinction. The goods have never really been bonded in the name of the consignee. It may be doubted if the crown had any remedy against him for the duties. The original bond, taken in Montreal, was the one, I apprehend, on which the crown would be obliged to rely for the payment of the duties. But under section 60 of the Customs Act referred to, sub-secs. 2 and 3, if the goods are transferred in the books of the department to a purchaser, and stand there in his name, and he has given security for the payment of the duties, then, perhaps, the rule referred to in the judgment

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(a) *Graham v. Smith*, on appeal to the full Court, is reported in 27 C. P. 1.

of Chancellor Walworth, and of the Scotch Court, might apply. But, as at present advised, it would not apply to this case, for the goods are not and were not bonded in the consignee's name."

I cannot quote the judgment of the learned Chief Justice as a decided authority in favour of the view which I have arrived at, because it is expressed in the form of a doubt, but it appears to me that the inclination of his opinion was, that in a case like the present the *transitus* is at end. To hold otherwise would be to lay down a rule that so long as the duties were unpaid the *transitus* continues.

It is not possible that there could be a stronger case than the present. The goods were stored in the name of the purchaser, he had sold large quantities of them, and had the full and absolute control over them, subject only to the payment of duty, for which he had given his bond.

I have not thought it necessary to cite the authorities, as they are all collected and commented on in the case to which I have referred.

Judgment will be entered for the defendant in both cases.

*Judgment for defendant.*

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From this judgment the plaintiffs appealed to the Court of Queen's Bench.

The case was argued on September 4th, 1876.

*O'Donohoe* and *Meek*, for the appellants.

*Foster* and *J. B. Clarke*, for the respondent.

The argument was substantially the same as in the Court of Appeal.

•September 26, 1876. MORRISON, J.—Since the argument of this appeal, judgment has been given in a case, *Graham v. Smith*, 27 C. P. 1, arising out of the same insolvency,

and in this case a similar question was raised as here. Judgment was given in favour of the plaintiff.

We follow that decision, and our judgment will therefore be for the plaintiffs.

*Judgment for plaintiffs.*

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The defendant thereupon appealed to this Court.

The appellant's reasons of appeal were:—

1. That prior to and at the time of the giving of the alleged notice of stoppage the *transitus* was ended, and the delivery complete, by reason of the goods having been stored in the bonded warehouse of E. Bendelari & Co., bonded by them and in their own name, and the entry duly perfected: *Mottram v. Heyer*, 5 Denio (N.Y.) 629; 2 *Kent's Commentaries*, ed. of 1866, p. 547; *Strachan v. The Trustees of Knox*, 19 Fac. Coll. 253, referred to in *Bell's Commentaries*, 5th ed. p. 173; *Shaw's Digest*, 1872; *Bell's Illustrations of Principles*, vol. 1, p. 388; *Haig v. Wallace*, 2 H. & B. 661; *Lewis v. Mason*, 26 U. C. R. 590, per Richards, C. J.

2. That the claim of the appellant to secure actual possession from the collector of customs having preceded the claim of the respondents, rendered such latter claim ineffectual, and divested the respondents' right of stoppage: *Reid v. Bowen*, 4 Ex. 786; *Ellis v. Hunt*, 3 T. R. 464.

3. That the judgment of Mr. Justice Galt was in accordance with law, and should be sustained for the reasons therein stated.

The following were the respondent's reasons against the appeal:—

The appeal ought to be dismissed with costs. The respondents rely on *Northey v. Field*, 2 Esp. 613; *Lewis v. Mason*, 36 U. C. R. 590, and cases there referred to; *Burr v. Wilson*, 13 U. C. R. 478; *Howell v. Alport*, 12 C. P. 375; *Graham v. Smith*, 27 C. P. 1. Judgments of Queen's Bench and Common Pleas herein.



The case was argued on the 20th December, 1876.

*Foster* and *J. B. Clarke*, for the appellant. When the goods reached the insolvents' bonded warehouse, the delivery was complete, and when bonded in their name possession was had subject to the crown's claim for duties. The Customs Act, 31 Vic. ch. 6, secs. 13, 60, D, provides for taking samples, sorting, packing, and in the case of sugar, refining, while in bond; also, for sale, transportation from port to port during a period of two years. While bonded the goods were at the risk and expense of the insolvents. The goods had arrived at the end of their journey and become stationary at the orders of the buyers; nothing remained to be done between buyer and seller; the customs' officers were not middlemen as between buyer and seller. If intent has weight in determining if there was a change of possession from buyer to seller, the facts show that they both clearly intended to change possession. The seller had parted unconditionally with all the possession he had; the bill of lading, the title to possession on arrival, and which vested in the buyer the right to pass the property to others, had been transmitted, and authority was intended to be given by it. The acts of the buyer show that he had intended to take possession. He had paid the freight, entered the goods in his own name, warehoused them on his own premises, and given his bond for the duties. The customs' officers, upon entry, held the goods for the buyers. Delivery to a warehouseman to whom a vendee pays rent, is complete: *Wright v. Lucas*, 4 Esp. 82; *Cross on Lien*, 384. If goods are warehoused with a carrier to whom rent is to be paid, that destroys the right: *Lickbarrow v. Mason*, 1 Smith's L. C. 819. A carrier may become agent for the buyer while retaining a lien: *Allan v. Gripper*, 2 C. & J. 218; *James v. Griffin*, 2 M. & W. 623. The production of the bill of lading to the customs' officials was equal in effect to the ordinary case of a delivery order, which makes the warehouseman bound to hold as agent for the vendee: *Harman v. Anderson*, 2 Camp. 243. Where the vendee had lodged a delivery order with a wharfinger, and

the latter had transferred them in his book, it was held that the right of stoppage was gone: *Lucas v. Dorrein*, 7 Taunton 278.

The rule is, that notice of stoppage to be effectual must be given to the person who has the immediate custody or possession: *Whitehead v. Anderson*, 9 M. & W. 518. In *Burr v. Wilson*, *infra*, the goods were yet with the wharfinger, and though bonded, notice to the wharfinger as being in possession was held good. In *Ascher v. Grand Trunk R. W. Co.*, 36 U. C. R., 609, when the stoppage took place, the goods were in a bonded car, yet notice to the railway company was held good, although it was contended in both cases that the custody of the customs' officers was not the possession of the wharfinger or carrier, and therefore the notice bad. Here the goods were in the possession of the insolvents, though bonded, as much as the goods in the last cases were in the possession of the railway company or wharfinger. In each, there was the custody of the crown.

The appellant's position is supported by *Strachan v. Knox*, Bell's Com., 5th ed., 173; *Mottram v. Heyer*, 5 Denio 629; 2 Kent's Com. 547, ed. of 1866; *Parker v. Byrnes*, 1 Lowell 539; *Haig v. Wallace*, 2 H. & B. 671; *Lewis v. Mason*, 36 U. C. R. 590, per Richards, C. J., and the authorities collected in the notes to the leading case of *Lickbarrow v. Mason*, 1 Smith's L. C. 819; *Howell v. Alport*, 12 C. P. 375, affirms the right to stop where goods are warehoused, but it cannot be supported on principle or authority. The point now raised was not taken in that, the opposing cases not cited, and it was based on *Burr v. Wilson*, 13 U. C. R. 478, as if there was no difference between them. But in *Burr v. Wilson* there was no entry or bonding by the purchaser; and it was supposed to be warranted by a *Nisi Prius* decision, *Northey v. Field*, 2 Esp. 613, which is clearly distinguishable, as pointed out in *Haig v. Wallace*, *supra*.

A rule that the right of stoppage exists so long as duties are unpaid, would be fraught with great inconvenience to

commerce, and well calculated to facilitate and protect fraudulent preferences. The object of the bonding system is explained in *Smith's Wealth of Nations*, 400, and *McCulloch's Commercial Dictionary*.

*O'Donohoe and Meek*, for the respondents Where goods are in the possession of the Customs officers and the duties are unpaid, they cannot be considered to have reached either the actual or constructive possession of the vendee; and if the vendee becomes insolvent before the duties are paid, the right to stop *in transitu* exists. The fact that the goods are bonded by the consignee makes no difference. This doctrine is clearly laid down in *Northey v. Field*, 2 Esp. 613; and it has been followed in every case in our Courts: *Howell v. Alport*, 12 C. P. 375; *Burr v. Wilson*, 13 U. C. R. 478; *Lewis v. Mason*, 36 U. C. R. 590; *Asher v. The Grand Trunk R. W. Co.*, 36 U. C. R. 609. *Strachan v. Trustees of Knox & Co.*, 19 Faculty Coll. 253, can have no bearing on this case as it relates to the British warehousing system, which is very different from ours. The second ground of appeal is not open to the appellants, as the special case does not shew that any claim to the goods was made by the assignee; but even if it be admitted that he made such a claim, it is insufficient without paying or tendering the duties, which it is not pretended he did. In the cases cited in support of this second ground, nothing remained to be done except to claim the goods. The following authorities were referred to: *Edwards v. Bremer*, 2 M. & W. 375; *Feise v. Wray*, 3 East 93; *Jenkyns v. Usborne*, 7 M. & G. 678; *Benjamin on Sales*, 723-4-5, 2 ed.

February 20th, 1877 (a). BURTON, J. A.—The decision of the Court below, as well as that in *Graham v. Smith*, 27 C. P. 1, in the Common Pleas, arising out of the same failure, are founded upon the judgment in *Howell v. Alport*, decided by the Court of Common Pleas in 12 C. P. 375.

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(a) *Present*.—BURTON, PATTERSON, MOSS, J.J.A., and PROUDFOOT, V.C.

The point for decision is, did the right to stop *in transitu* exist after the delivery in the bonded warehouse, which was also the purchaser's warehouse, and after the recognition of his title by the custom house officers by accepting from him, as the importer of the goods, a bond for their exportation or payment of the duties upon them.

It is of the essence of the doctrine of stoppage *in transitu*, as laid down in *Gibson v. Carruthers*, 8 M. & W. 328, that during the *transitus* the goods should be in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired actual possession.

We agree with the learned Judges of the Court of Common Pleas, that there is no substantial distinction between this case and that of *Howell v. Alport*, 12 C. P. 375, and we are brought face to face with the question of whether that is or is not good law.

We are somewhat relieved from the difficulty which we might otherwise have felt in deliberately over-ruling a decision arrived at by the eminent Judges who then constituted the Court of Common Pleas, from the doubts expressed by one of those Judges in delivering judgment in the recent case of *Lewis v. Mason*, 36 U. C. R. 590, where, in commenting on a similar state of facts, he says, "But under sec. 60 of the Customs Act, sub-secs. 2 and 3, if the goods are transferred in the books of the department to a purchaser, and stored therein in his name, and he has given security for the payment of the duties, then perhaps the rule referred to in the judgment of Chancellor Walworth and of the Scotch Court might apply. But, as at present advised, it would not apply to this case, for the goods are not and were not bonded in the consignee's name."

In *Howell v. Alport* the Court followed the decision in *Burr v. Wilson*, 13 U. C. R. 478, overlooking, apparently, the distinction which existed between the case then under consideration, and *Northey v. Field*, 2 Esp. 613, on which *Burr v. Wilson* was decided.



In *Northey v. Field*, 2 Esp. 613, whilst the vendor consigned the goods to his vendee, he sent the bill of lading to his own correspondent, and gave no delivery order to the vendee, and the vendee's right arose simply from the fact of the sale. As the law then stood, the goods remained on board for twenty days to enable the owner to pay the duties, by which payment alone he could obtain possession.

The consignee failed within the twenty days, and the duties not having been paid, the goods were transferred into the King's cellar, but they were never entered or the duties paid before they were claimed by the consignors, and, to adopt the language of Chancellor Walworth, "The removal of the goods from the vessel to the public store by the custom-house officer was merely substituting the public store in place of the vessel as a place of deposit in the transmission of the goods to their place of destination.

The goods, therefore, in that case never passed to the vendee, and remained in the possession of a person who was in no way in privity with the vendee, but was, as this case puts it, a middleman between the vendor and purchaser. The case, therefore, may be looked upon as an authority for the decision in *Burr v. Wilson*, but does not warrant the conclusion arrived at in *Howell v. Alport*.

Under the Customs Act the importer may, instead of paying the duties, warehouse the goods on giving security for the payment of the duties and the performance of all the requirements of the Act.

Under the same Act he may remove the goods under the authority of the officers from one warehousing port to another. Under section 60 the property (without breaking bulk) may be transferrable from party to party on a *bonâ fide* bill of sale by the parties or their broker or attorney. Certain formalities are required in the event of the goods still remaining in the same warehouse; but the proper officers may, in the event of a sale, take fresh security from the new proprietor, who shall then be deemed the importer for the purposes of the Act.

Here the goods had arrived at their place of destination,

and although that would not in itself necessarily be a termination of the transit, it would be so if the purchaser accepted delivery, and the right may be put an end to by a symbolical as well as an actual delivery. By the very terms of the Act of Parliament property of this description may be the subject of dealings between party and party though the Crown hold them in possession for the payment of the duties, and this without actual payment of the duties by the transferee, who may give security for the payment of them in the same way as his vendor did; and if we were to adopt the reasoning of one of the learned Judges in *Graham v. Smith*, 27 C. P. 1, that this was merely "equivalent to a declaration by the vendor that he was not prepared to pay the duties, and that the goods still remained in the custody, power, and control of the customs officers as intermediate parties between the unpaid vendor and the vendee so as to prevent the termination of the transit," the portion which was sold by the vendee here to Messrs. Simpson, Stuart & Co., and transferred to the Hamilton custom house in bond, would be, whilst remaining there in bond, liable to stoppage equally with the goods in question.

It appears to me that the question, and the only question, in determining whether the *transitus* is ended, is, to ascertain in what capacity the goods are held by the person who has the custody. Is he the vendee's agent to keep the goods, or does he hold them as the agent of the carrier, or as a mere bailee or middleman not exclusively the agent of the vendor or vendee?

The delivery into a warehouse, though belonging to the insolvent but used also as a bonded warehouse, would not in itself be a delivery to him; but whenever the collector of customs recognized his title and took from him a bond for the payment of the duties at a future day, it appears to me out of the question to contend that the customs officer was a middleman, and that notice to him would operate as a stoppage *in transitu*. There was, as observed in one of the cases cited, nothing remaining to be done on the part of the vendee as between him and the vendor. All that

remained to be done was between the vendee and the crown, and if the officer representing the crown in the exercise of his lawful authority chooses to accept the bond of the vendee in place of the duties, it scarcely lies in the mouth of the vendors to say that the delivery is not complete. From the moment the collector of customs received the bond of the vendee, there was as complete a delivery as if the goods had been delivered into his own hands. The collector had a lien on the goods, and would be justified in detaining them until it was satisfied; but as between vendor and vendee the goods were at home, and constructively in the possession of the purchasers; the customs authorities (subject to the payment of the duties) having by the acceptance of the bond undertaken to hold them for the use of the purchaser, and subject to such sales or dispositions as he might choose to make.

I think the appeal should be allowed, and the judgment entered for the defendant.

Moss, J. A.—I am so entirely in accord with the judgment pronounced by my brother Burton, that I should have contented myself with a simple expression of acquiescence, had not the respect due to the opinions of the eminent judges from whom we are compelled to differ, and the great importance to the mercantile community of the question involved in this appeal, induced me to endeavour to explain the reasons and considerations by which I have been brought to my conclusion.

The importance of the question is obvious. The system of storing goods in bonded warehouses belonging to themselves is almost universally adopted by importers, and any decision affecting rights in such goods must be of vital consequence. Large numbers of persons are concerned to know what are the respective rights of the unpaid vendor of such goods, and of the general creditors of the vendee upon his becoming insolvent. The decision appealed against gives the unpaid vendor the right of stoppage *in transitu*, and thus ensures him a lien



for his purchase-money, in preference to the general body of creditors. This rule must be very far-reaching in its consequences. I agree with the expression that fell from Mr. Justice Galt upon the original hearing of the case of *Graham* against the present defendant, that to hold otherwise than that, in a case like the present, the *transitus* is at an end, would be to lay down a rule that so long as the duties were unpaid the *transitus* continues. I think that unquestionably such is the logical result of the decision. The express ground upon which it is put is, that until the duties are paid the goods cannot be deemed to have reached the possession, either actual or constructive, of the purchaser, but remain in the custody of the officers of the law as intermediate parties between the vendor and the vendee, so as to prevent the termination of the *transitus*. This custody, of course, continues until the duties are paid. These, however, need not be paid for two years after the goods are first stored. They may be sold by the original vendee, and their *situs* changed to another bonded warehouse belonging to this sub-purchaser, without the duties being paid or the custody of the law being relinquished. It is not difficult, therefore, to perceive that the rule laid down and now impugned is attended with grave consequences, and that the principle upon which it rests ought to be subjected to careful examination.

The judgment now in appeal was pronounced by the Court of Queen's Bench, which, without expressing any independent opinion, simply followed the judgment of the co-ordinate Court in *Graham v. Smith*, 27 C. P. 1. That case, which arose out of a precisely similar state of facts, first came before Mr. Justice Galt, sitting for the Court out of term, and that learned Judge was of opinion that the right of stoppage had been lost, but his decision was reversed with his concurrence by the full Court, who thought that the case was not distinguishable from *Howell v. Alport*, 12 C. P. 375. It was conceded by the learned counsel for the appellant, that there was no ground upon which a distinction



could be drawn, and he therefore directly impugned the authority of that case.

I feel strongly that the considered judgment of a Court composed of Judges, so eminently distinguished for learning and experience, should not, after standing unchallenged for fifteen years, be overruled, except for reasons the clearest and most convincing. If such reasons did not appear to me to exist I would readily have sheltered myself under their authority, and whatever misgivings might have arisen in my mind as to the possible consequences of the rule to which they had given their sanction, I would have left the mischief, if mischief there were, to be remedied by legislation. But as an investigation, in which I have at least spared no pains, has led me to a strong conviction that the decision is not supported either by principle or authority, I could not deem myself justified in abstaining from giving the benefit of it to the appellant.

I shall first endeavour to examine the case with reference to the general principles established upon the subject of stoppage *in transitu*, seeking, as it were, for the proper conclusion, if this were the first occasion on which it was the duty of a Court to pronounce upon the existence of the right under such circumstances. I shall then review, as briefly as may be, the decisions in which the precise point has been more or less directly touched.

The question is, whether the *transitus* was terminated. If it was not, all other conditions exist to entitle the vendor to resume possession.

I think the general rule to be collected from the cases is, that the *transitus* continues until the goods have reached their final place of destination, as contemplated between the consignor and consignee, so that in the ordinary course of business they would remain there until further orders, not contemplated in the original contract, were given by the consignee. This rule may be subject to the qualification that when the goods have been entrusted to a common carrier for delivery, the consignee may stop the

transit, and intercept the lien, by taking actual possession in good faith before they have reached the designated destination.

In *Dixon v. Baldwin*, 5 East 175, goods had been shipped by the defendants to Metcalf and Co., at Hull, upon orders received from the Battiers, traders, living at London. The course of dealing was for the Battiers to send orders to Metcalf and Co., to send these goods to correspondents at Hamburg. The order sent to the defendants for the goods directed them to be packed in bales, and to be forwarded to Messrs. M. and Sons, to be shipped for Hamburg as usual. While the goods were still at Hull, the Battiers stopped payment, and the defendants then took possession. The majority of the Court (Lord Ellenborough, Lawrence, and Le Blanc, J.J.), held that the *transitus* was at an end; but Grose, J., was of opinion that the right to stop *in transitu* still existed. Lord Ellenborough, after commenting upon and explaining the earlier authorities, put the decision upon the ground that the goods had so far gotten to the end of their journey, that they waited for new orders to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary.

In *James v. Griffin*, 2 M. & W. 633, Parke, B., adopts as correct the statement of the law I have just quoted, and says that the delivery which puts an end to the *transitus* may be at a place where the vendee means the goods to remain, until a fresh destination is communicated to them by orders from himself.

In *Dodson v. Wentworth*, 4 M. & G. 1080, the goods had been deposited in the warehouse of a person unconnected with the carriers, who had been accustomed to put into his warehouse goods arriving at this particular landing place for the purchaser, without making any warehouse charges, and to deliver them to the purchaser, or upon his order, without any further communication with the carriers.

It was held that the *transitus* was at an end when the

goods were lodged in the warehouse. Stress was laid by the Court upon the circumstance that the warehouse did not belong to the carriers; and the fact that the purchaser lived 13 miles from the place where the warehouse stood was held to make no difference. In fact, as I read the judgment, its natural interpretation was given to *transitus*, and the circumstance that the goods had reached the point mentioned in the bill of lading, and had been placed in a storehouse with which the carriers had no connection, was deemed conclusive.

In pronouncing judgment Sir Nicholas Tindal, C. J., referred to *Allan v. Gripper*, 2 C. & J. 218; a case which seems to present some close analogies to that we are now considering. The plaintiffs, who were seed pressers at Twickenham, sold oilcakes to one Pestall, who carried on business at Baldock, in Hertfordshire. The goods were conveyed on the barge of a common carrier to the point where the river Lee falls into the Thames, and there transhipped into the barge of the defendants, who were carriers from the mouth of the Lee to Hertford, there being no water communication between Hertford and Baldock. Pestall's course of business was that oilcakes carried up the Lee to Hertford for him should be deposited in the warehouse of the defendants; and when he or his customers wanted oilcakes, old oilcakes were given out, and not oilcakes recently stored. That practice was followed in this case, and after the goods had been removed to the defendants' storehouse, the plaintiffs sent them a message desiring them not to deliver the goods to Pestall, to which the defendants replied that they would deliver the goods to no one, as Pestall was in their debt, and they wished they were double the quantity. It was argued by counsel that the real question was, whether the defendants' character of carriers had ceased to exist, because, if it had not, the plaintiffs were entitled to stop *in transitu*, and that it was only by virtue of that character continuing that the defendants could claim the lien, which they set up as giving them a right to retain the goods. During the argument

Bayley, B., observed that if the goods were to remain at the warehouse until some new destination was given them by Pestall, the *transitus* must be considered at an end. He thus explained the position assumed by the defendants. "The goods are Pestall's goods; the *transitus* is at an end; we will not deliver to him, because we have a lien; nor to you, because the *transitus* is at an end, and your right to stop is gone." He based his opinion that the *transitus* had terminated, upon Pestall's having complete power to give a new destination to the goods, and added: "when they arrived at the place where they were to await such fresh destination, the destination contemplated by the plaintiffs, and Pestall was at an end."

It may be observed that Pestall's powers of dealing with these goods do not seem to have been more extensive than Bendelari's were in this case. The defendants, in *Allan v. Gripper*, 2 C. & J. 218, were insisting upon their lien, and could not have given actual possession to Pestall without being satisfied. Here the customhouse officers would at any time have delivered the goods to Bendelari, upon being paid the duty, to secure which alone they retained them in possession. Pestall could not have changed the destination of the goods without such payment or the defendants' assent. Under the authority of the officer, Bendelari, could have passed these goods on to any warehousing port in the Dominion; or could have packed them, or made arrangements for preserving or disposing of them, or have taken moderate samples without any present payment of duty, or by a bill of sale transferred the property in them, even if they still remained in the warehouse.

In *Wentworth v. Outhwaite*, 10 M. & W. 436, it appeared that the goods in question had been taken by the defendants, who were carriers, to their warehouse at Leeds. The purchaser lived at Mickley Mills, a place about thirty miles from Leeds. It had been the custom of the defendants to give notice of the arrival of goods to this purchaser, who then sent his carts for them, and conveyed them to Mickley Mills. On the arrival of these goods the



defendants notified the purchaser by a letter, which also stated that unless the goods were sent for, they would remain there at warehouse rents. The jury found that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills. The Court were unanimously of opinion that the *transitus* was terminated on the arrival of the goods at the defendants' warehouse. Parke, B., was of opinion that it was at an end, both because the goods had come into the constructive possession of the vendee, and because they had arrived at the place of destination. He held that when the goods arrived at Leeds, and notice of their arrival was sent to the purchaser, and that he was to pay rent, the carriers held them, not as agents for forwarding them, but for their safe custody, and they were constructively in the possession of the vendee. He also said: "Again, I think the goods had arrived at their place of destination, for that, as I understand, means the place to which they were to be conveyed by the carriers, and where they would remain, unless fresh orders should be given for their subsequent disposition."

It seems to me that those goods were not more in the constructive possession of the purchaser, because he had received such a notice from the carrier, then these in question here were in Bendelari's constructive possession. These goods had been delivered by the carriers, the Railway Co., and the freight upon them had been paid by Bendelari. The statute provides that the unshipping, carrying, and landing of the goods should be performed by him, or at his expense. From the bond he gave, it appears that he himself took charge of this work; although, presumably, under the direction of the officer—for part of the condition is, that "all the goods so imported shall be safely deposited in such warehouse, situate as aforesaid," his warehouse having been previously described. These, and the other circumstances referred to by my brother Burton, appear to me to make up a constructive possession at least as strong as that which Mr. Baron Parke held to be fatal to the existence of the vendor's right.

In *Jackson v. Nichol*, 5 Bing N. C. 508, Tindal, C. J. while holding that the vendors had the right of stoppage, because they had not come to the actual possession of one Crawhall, an agent of the purchasers, as they were seized, while still on a lighter, and because Crawhall was only an agent in this particular case to forward, expressly said : "If the load had been delivered into the possession of Crawhall, as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, such possession of Crawhall would have been the constructive possession of the buyers themselves, and the right to stop *in transitu* would have been at an end."

*Valpy v. Gibson*, 4 C. B. 837, which was very fully argued, and in which judgment was given after a *curia advisari vult*, throws light upon the application of the doctrine, although no attempt is made to define its terms. The material facts were, that one Brown, a general merchant at Birmingham, purchased goods from the defendants, who were general commission agents at Manchester and Leeds. The goods were intended for the Valparaiso market, and Brown instructed the defendants to forward them to Leech & Co., at Liverpool, to be shipped on board a vessel bound for Valparaiso. In conformity with these instructions the defendants sent the goods by rail to Leech and Co., at the same time despatching a letter, requesting them to transmit certain pattern cards along with the cases of goods, "as Mr. Brown, of Birmingham, may direct the same to be shipped." A few days afterwards the goods were loaded by Leech & Co., upon a vessel bound for Valparaiso. Whilst the goods remained on board this vessel they were relanded at the request of a member of the Valparaiso house, and returned to the defendants for the purpose of being repacked in eight cases, instead of four. The defendants, in conformity with a request made by Brown, commenced to repack, but before this work was completed Brown suspended payment. The goods remained in the possession of the defendants for nearly three months, when the assignees in bankruptcy of Brown made

a demand for them, and upon the defendants' refusal to give them up brought trover. It will be observed that there was in this case the feature that the goods were in the possession of the vendors, and actually in their warehouse when the insolvency occurred. Nevertheless, it was held that the *transitus* had been determined. The Court were of opinion that the *transitus* was at an end, as soon as the goods came to the hands of Leech & Co., because they could not simply upon the information received from the defendants forward the goods to Valparaiso, but held them subject to such orders as Brown might give, as to forwarding them to that place. But it was held that at all events by Leech & Co. relanding the goods under the authority of Brown, and sending them to be repacked, Brown dealt with them as owner, and this would certainly put an end to the right of stoppage, which was not revived by their delivery to the defendants to have them repacked.

In *Cooper v. Bill*, 3 H. & C. 722, the defendants had made a contract for the sale of timber to one Gurney. It was to be delivered by them free to boats where required. The timber was taken to two wharves, where it was measured by Gurney's agent, and marked with his initials. By the directions of this agent the timber was squared, and the expense paid by Gurney. Some negotiations took place between the defendants and Gurney, as to their freighting the timber, but no bargain was made. The wharves were the property of a Canal Company, and were termed "free wharves." The timber was not placed at the water's edge, and labour would be required to take it there. Whilst the timber remained on the wharves, Gurney, having become insolvent, made an assignment for the benefit of his creditors, and his trustees brought detinue. In the course of the argument, Martin, B., observed: "Stoppage *in transitu* can only take place where there is a vendor, vendee, and a middleman, such as a carrier." In pronouncing judgment, Pollock, C. B., said: "No doubt stoppage *in transitu* can only take place while goods are on their way to their place of destination." While thinking that the question

was not one of stoppage *in transitu* properly called, he was of opinion that by allowing the purchaser to measure the timber, mark it with his initials, and expend money in having it squared, the vendors were precluded from claiming to retain it for their lien.

It appears to me that in the absence of authority we could scarcely come to the conclusion that the Customs' officer in this case was a middleman, in the sense in which Mr. Baron Martin used that term. There is a wide difference between an officer who acts solely for the purpose of securing and collecting the public revenue, and a person standing between the vendor and vendee, in some sort of connection with each. Again, the respondents in this case must be taken to have dealt with Bendelari, according to the usual course of business. They may not have thought of the customs' regulations at all, but if they did, they were bound to know that under them Bendelari could repack the goods, mark them as he pleased, take samples from them, and dispose of them to a purchaser, while they still remained in the bonding warehouse. Mr. Baron Martin put his judgment on the ground that it was *the intention* of the parties that after the timber was measured, numbered, marked, and squared, and the bills delivered, the vendee should have the absolute possession. It is to be inferred, at least as strongly, I think, that it was the intention of both the respondents and Bendelari, that the latter should have the absolute possession. They made no stipulation about payment of duties before possession was taken; they did not know whether Bendelari would pay them on arrival, or avail himself of the warehousing system; they gave him the bill of lading, and received his acceptances for the price, the cartage, and the American bonding charges.

In *Smith v. Hudson*, 6 B. & S. 431, Cockburn, C. J., succinctly stated the rule; "It is quite clear the *transitus* had ceased. The goods had arrived at the place which, as between buyer and seller, was the place of their destination; and they were in the custody of the Railway Co.,



not as carriers, but as warehousemen, and fresh orders were requisite for a fresh destination."

The goods in question in the late case of *Schotsmans v. Lancashire and Yorkshire Railway Co.*, L. R., 2 Ch. Ap. 332, had been placed by the vendor upon a vessel belonging to the purchaser, but used as a general trader. The captain signed four bills of lading of the goods, which made them deliverable to the purchaser or his assigns, and of which he gave three to the vendees, and kept one himself. The bills of exchange given by the purchaser having been dishonoured, a person to whom the bill of lading had been endorsed on behalf of the plaintiff, served notice on the part of the owner of the ship not to part with the goods. Lord Chelmsford and Sir H. M. Cairns, L. J., concurred in holding that there had been such a delivery to the purchaser as to preclude stoppage *in transitu*, before the delivery of the goods at the port of assignment. Although the facts are thus different from those in the present case, I think the *ratio decidendi* is not inapplicable. Lord Chelmsford observes "that it is of the essence of the doctrine of stoppage *in transitu*, as was most correctly and clearly stated by Lord Cranworth, when Baron Rolfe, in the case of *Gibson v. Carruthers*, 8 M. & W. 328, 'that during the *transitus* the goods should be in the custody of some third person, intermediate between the seller who has parted with and the buyer who has not yet acquired actual possession." He further said: "The consignee was the owner of the vessel, on board which the flour was shipped; the master was his servant or agent. The vendor's agent, with a knowledge of these facts, delivered the flour to the consignee's agent, to be conveyed to the consignee, and he assented to the bills of lading being made out for delivery of the flour to the consignee or assigns. He placed no condition or restriction upon the delivery, so as to leave the vendor any control from the moment the flour was shipped in the consignee's known ship, under such a bill of lading. If the intention of a vendor has anything to do with the question, these facts and circumstances are an undoubted indication of the

intention that the possession, as well as the property of the flour, should pass to the consignee at the time of its shipment."

It will be observed, that his Lordship seemed inclined to take the view of the effect of the parties' intention, which Mr. Baron Martin had propounded in *Cooper v. Bill*, 3 H. & C. 722; and his remarks give point, I think, to the comparison I have drawn between that case and the present. No doubt the ground-work of the decision in Schotsman's case was, that the delivery to the captain was under the circumstances to be treated as a delivery to the purchaser, but in arriving at that conclusion the question of intention was deemed worthy of consideration. The delivery was in itself an equivocal act. If the consignor had been ignorant of the ownership of the vessel, his position might possibly have been different, as it probably would have been if he had shewn an intention of reserving any control over the goods, by requiring the bills of lading to be drawn in favour of himself or his assigns. It is difficult to perceive how the receipt of the goods by Bendelari himself, and the conveying them to his own warehouse, where they were expected to remain until they were disposed of, as we must reasonably infer, although this was done under the authority and pursuant to the regulations of the customs' officials, and the forwarding of a bill of lading to him, under which possession was obtained from the carrier, can be less cogent evidence of an intention to give him absolute possession, than were the proceedings of the vendors in Schotsman's case.

The same general principle is equally traceable in the series of cases in which it has been determined that the right of stoppage could be enforced. For example, while holding in *Coates v. Railton* 6 B. & C. 422, that the *transitus* had not ended, because the agency of the person to whom they were delivered at Manchester for the vendee only extended to buying the goods, and forwarding them to Lisbon to the vendee, the judgment states that it is a general rule that when goods are sold, to be sent to a par-

ticular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination. Bayley, J., after elaborately examining all the earlier cases, said: "The principle to be deduced from these cases is, that the *transitus* is not at an end until the goods have reached the place named by the buyer to the seller, as the place of their destination."

In *Van Casteel v. Booker*, 2 Ex. 691, the goods had been delivered on board a ship belonging to the purchasers. The vendors procured the captain to sign bills of lading, making the goods deliverable to their order or assigns, stating them to be freight free. In the judgment which was delivered by Parke, B., it was held that if the goods were put on board to be carried for and on the account and risk of the vendees, the delivery there put an end to the right of stopping *in transitu*. He said: "Notwithstanding the form of the bill of lading, therefore, the contract may have been really made on behalf of the vendee, though *prima facie* it is made on behalf of the vendor; and it is a question for the jury, to be decided on the evidence, looking at the form of the bill of lading, particularly noticing that it is made *freight free*, and the language of the invoice, and the immediate transfer of the bill of lading to the bankrupts, and other facts, whether the goods were not *really* delivered on board to be carried for and on account and at the risk of the bankrupts. If they were, they had arrived at their journey's end, when they were delivered on board, and the right of stopping *in transitu*, and also the power of rescinding by the bankrupts, so as to defeat the rights of their creditors, were both at an end." I may ask whether the goods had arrived at their journey's end more certainly in any sense than those in question in this case.

The Exchequer Chamber decided in *Turner v. Trustees of the Liverpool Docks*, 6 Ex. 543, that the right of stoppage had not been lost by a delivery on board the vendee's own ship; but this was because the vendors had taken bills of lading for the delivery of the goods to their own order, or to their assigns. This was distinguished from the case of a

delivery to a carrier for the purpose of his delivering them to the vendee, and treated as a delivery for the purpose of the carrier delivering them according to the order of the vendor, who thus retained more than a mere lien, and indeed reserved a *jus disponendi*. This does not in the least trench upon the general rule, and cannot be appealed to as an authority favourable to the respondents.

Sir W. Page Wood, in *Berndtson v. Strang*, L. R. 4 Eq. 481, decided that the right of stoppage had been preserved, notwithstanding the delivery of the goods on board a ship chartered by the purchaser for the purpose of conveying the timber, and on this point his decree was sustained by Lord Chancellor Cairns on Appeal. L. R. 3 Ch. App. 588. But the ground of the decision was, that by procuring bills of lading, in which the timber was made deliverable to his order or assigns, he had secured himself, and interposed the master as a carrier between himself and the purchaser, until the ship had reached the port to which the timber was to be forwarded as its place of destination. The learned Judge shows clearly throughout his judgment from beginning to end that he recognizes the rule exactly as it has been stated in the cases already cited.

The material facts in *Fraser v. Witt*, L. R. 7 Eq. 64 were very similar, and the decision was the same; but Lord Romilly did not, any more than Vice Chancellor Wood, seek to alter the doctrine heretofore enunciated, but on the contrary considered it to be well settled. His judgment was founded on his finding in fact, that there was no delivery to the vendee or his agent; no delivery at the vendee's own warehouse, or at a place which he used as his own; and no delivery at a place where the vendee meant the goods to remain until a fresh destination was communicated to them by orders from himself. These premises being established there could be but one conclusion. But he is manifestly of opinion that if they had reached a place where the vendee meant them to remain until he had directed a change of destination, the *transitus* would have been at an end.



It was attempted in *Coventry v. Gladstone*, L. R. 6 Eq. 44, to make out that the *transitus* had terminated because the chief officer on board the ship informed the lighterman, who had been employed by a transferee from the purchaser of the bill of lading to bring away the goods, that he should have them as soon as they could be got at; but Wood, V. C., refused to attribute this effect to the statement. Before the ship had broken bulk the purchaser had become insolvent, and a notice was served by the vendor upon the captain. The ground of the decision was, that the duty of the captain, as carrier, was not terminated, nor was it converted into a new duty to retain the goods as agent for the consignee; but the learned Vice Chancellor expressly recognized the authority of *Whitehead v. Anderson*, 9 M. & W. 518; and *Wentworth v. Outhwite*, 10 M. & W. 436. He used the following language, which is in harmony with the rule as already given:—

“In order to put an end to the exercise by the unpaid vendors of their right of stoppage *in transitu* the goods must have arrived at their original destination, or at the place directed as the place of delivery by the original consignee, or the person in possession of the bill of lading.”

Nor do I discover any deviation from this doctrine in the judgment of the Court of Common Pleas in *Bolton v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431. There the purchaser had declined to accept the goods and the vendor had refused to take them back, so that they remained in the hands of the defendants. The purchaser had never the intention of taking possession, but on the contrary had contended throughout that the goods were so bad that he was not bound to accept them, and in this state of things the unpaid vendor put his hands on them. On account of the purchaser's repudiation it was held that the goods had not reached either his actual or constructive possession. The possession of the warehouseman could not be his possession without his consent. It can not be said that this is an authority against the appellant, for he accepted, instead of repudiating, and even if the goods are to be deemed to have

been in the hands of the custom house officers, it was certainly with his consent.

Sir Joseph Napier, in delivering the judgment of the Privy Council in *Rogers v. Camptoir*, L. R. 2 P. C. 393, in which it was held that the *transitus* had not ended, thus expressed himself:—

“The general rule is, that when goods are sold to be sent to a particular destination, named by the vendee, the right of the unpaid vendor to stop them continues until they arrive and are delivered there according to the bills of lading. The *transitus* continues whilst they are in the charge of some third party, contracted with as carrier, for the purpose of forwarding them, and who has them in charge simply for this purpose.”

If this is a complete exposition of the law, it is decisive of this case. The goods here had been delivered according to the bills of lading. They were no longer in the charge of any third party, contracted with as carrier, for the purpose of forwarding them, and who had them in charge simply for that purpose. It was for a very different purpose that they were in charge of the customs officials.

In *Blackburn on Sales*, p. 244, the learned author says:—

“The acts accompanying the transport of goods are less equivocal, less susceptible of two interpretations as to the character in which they are done, than are those accompanying a deposit of goods. The question, however, is still the same, has the person, who has the custody of the goods, got possession as an agent to forward from the vendor to the buyer, or as an agent to hold for the buyer?

Even if the goods here were properly speaking in the custody of the officers of the law, can it be argued that they held them as agents to forward from the vendor to the buyer? Chancellor Kent, 2 Com. 545, expresses the opinion that the cases on the subject of constructive delivery may be reconciled by the distinction, that if the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a constructive delivery to the

vendee; but if the goods be delivered to the carrier or agent *for safe custody, or for disposal on the part of the vendee*, and the middleman is by the agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage."

The opinion of this eminent jurist, which is in itself entitled to great weight upon such a question, seems to me to be in entire conformity in substance with, and not very different in language from, the English decisions. Now the goods had certainly reached the hands of either Bendelari or the customs officer. If it be said of the latter, he certainly received them as agent. Then as whose agent? Certainly not as the vendor's, for with him he had not the slightest connection, and therefore it must have been as the purchaser's. Were they delivered to him for the purpose of conveyance to the vendee? No, for he was not to convey them any farther or at all. Then was he a special agent for safe custody, or disposal on the part of the vendee? If he is to be deemed an agent at all for either of the purposes mentioned by the learned author, I think the answer must be in the affirmative.

In *Cabeen v. Campbell*, 30 Penn. St. 254, Strong, J., applies as the test the inquiry whether the goods have reached their place of ultimate destination, understood as such between the seller and buyer. Even where there is a middleman he enunciates the rule to be, that, if in the hands of the middleman they require new orders to put them again in motion and give them another substantive destination, if without such new orders they must continue stationary, the delivery is complete, and the lien of the vendor has expired.

In *Covell v. Hitchcock*, 23 Wend. 612, Walworth C., remarked: "The time during which the right exists, therefore, is during the whole period of the transit from the vendor to the purchaser, or the place of ultimate destination as designated to the vendor by the buyer; and this transit continues as long as the goods remain in the possession of the middleman, whether he be the carrier either by land

or by water, or the keeper of a warehouse or place of deposit connected with the *transmission and delivery* of the goods."

I have thus far referred to the principal cases in which the general nature of this doctrine has been investigated and its true limits defined. I venture to think that if we approached the case in hand under the guidance solely of the principles thence deducible, we should not hesitate in concluding that the officer of the law did not occupy the position of a middleman between the vendor and vendee, so as to continue the *transitus* or preserve the right of stoppage. It seems to me that we should have thought the character of the duties he had to discharge, and the relationship he bore to the vendor, were wholly opposed to such a notion. I think we should have been of opinion that the control which he exercised was not inconsistent with the vendee's having the absolute possession as between himself and the vendor, and that there was such a plain intention on the part of the latter that he should have this possession as to exclude any lien. But there remains for consideration the question whether the authorities, in which the element of possession or control by the officers of the law engaged attention, have established a binding rule which leads to a result opposed, as I think, to principle.

Mr. O'Donohoe in his argument went through these cases very fully and elaborately. Indeed, he adopted the only course which, in my opinion, was accessible to him by placing upon them his chief, if not his sole reliance. As the learned Chief Justice of the Common Pleas remarks, our text books are singularly barren as to the stoppage of goods in bonded warehouses. The leading case, and that upon the foundation of which the decisions hostile to the appellant's contention have been built, as I humbly think, without sufficient warrant, is *Northey v. Field*, 2 Esp. 613. I need not recapitulate the facts of this case at any length, as they have been clearly and concisely stated in the judgments in *Lewis v. Mason*, 36 U. C. R. 590, and *Graham*



v. *Smith*, 27 C. P. I. It is sufficient to remark that the goods were not deposited in the King's cellars by either the consignor or the consignees, but the duties not having been paid within the twenty days allowed by law after the arrival of the ship, were removed then by the officers in the ordinary discharge of their duty. The goods were not entered by the consignees, nor was any act done by them toward taking possession. Their place of deposit was simply changed from the ship to the King's cellars in accordance with the law. There was no ground for contending that they had reached the possession, either actual or constructive, of the purchasers. While in the ship they were still *in transitu* to the purchasers, and did not lose that character by being transferred to the King's cellars. The officers did not take them for the purchasers, or as their agent. They simply succeeded the captain of the ship as custodians. The goods when in the cellar were subject to precisely the same incidents as while on board the vessel during the twenty days. Lord Kenyon is reported to have said that the bankrupt had no title to the actual possession until the duties were paid, which was certainly true as between him and the Crown; but the material fact is, that his position was no higher than if the goods had remained on board the ship. His Lordship is reported to have added that until the payment of the duties, the goods were *quasi in custodia legis*. Whatever may have been the precise significance which that very learned Judge intended to attribute to that phrase in this particular connection, the custody of the law there was manifestly a very different thing from the supervision or control it exercised here. There the law had assumed custody because the purchaser had remained inactive; here it exercised control at his instance. There the goods had never reached his possession and could not be taken to his store without payment of the duties; here they had reached his possession, had been taken to his own warehouse, and although subject to the supervision of the proper officers, might be dealt with by him in the way already indicated.

I gather that the unreported case of *Nix v. Olive* was similar in its circumstances; and I believe that these are the only English cases in which the effect upon the right of stoppage *in transitu* of the goods being placed in a custom's warehouse, has been the subject of adjudication. In the Scotch case of *Strachan v. Trustees of Knox & Co.*, which is referred to at length in *Lewis v. Mason*, 36 U. C. R. 590, the precise distinction is drawn between *Northey v. Field*, 2 Esp. 613, and such a case as the present. The decision was, that the *transitus* was terminated by the consignee making an entry of the goods and bonding them in the customs' warehouse. Bell, in his Commentaries on the Laws of Scotland, pointedly remarks that a delivery by the seller into the bonded warehouse for the behoof of the buyer of goods bonded in the buyer's name is as effectual a delivery as if made into the buyer's own cellar. The case here is still stronger against the alleged right, for it was the buyer who delivered the goods into the bonded warehouse. It is true, as remarked by the learned Chief Justice of the Common Pleas, that there does not appear to be any English case in which this Scottish decision has been discussed, although existing nearly sixty years, but it is also true, as he has not failed to observe, that the precise point apparently has not arisen. It might, perhaps, not unreasonably be suggested that it has not arisen, because no attempt has been made to controvert a decision which, so far as I can judge, is founded in good sense, and is in strict accordance with principle. In *Lewis v. Mason*, 36 U. C. R. 590, the present Chief Justice of the Supreme Court thought that perhaps, when the goods are transferred in the books of the department to a purchaser, and stored in his name, and he has given security for the payment of the duties, the rule referred to in *Strachan v. Trustees of Knox & Co.* might apply; but it was unnecessary for him to decide the point, because in that case the goods were bonded in the name of the consignor. If the rule could apply under such circumstances, it would certainly be not less applicable

where the goods had been taken to the warehouse by the purchaser himself.

The learned Chief Justice of the Common Pleas has referred to some Irish cases, which do not seem to have been discussed in England or to have been previously noticed in this country. In my judgment the decision in *Haig v. Wallace*, 2 Hud. & B. 661, tends strongly to support this appeal. The vendors, who had deposited some spirits in the King's stores subject to the payment of dues, gave a purchaser an order on the storekeeper to deliver them on payment of duty and storage. The order was presented and entered on the official record. It was held that the right of stoppage had ceased. The most elaborate of the judgments pronounced was that of Bushe, C. J. He thus put the point to be determined: "The remaining question is, whether the possession was so changed as to preclude the seller from a right to stop the goods *in transitu*, before they were actually delivered; in other words, whether what was done, converted the King's stores, which to a certain extent and in a certain sense were the warehouse of the seller, into the warehouse of the purchaser in the same sense, and to the same extent." Again he remarked: "The vendor, by the order for delivery, gave that which he had, subject to the claims of the Crown, to which the vendee then became liable instead of him."

He speaks of the actual delivery of the goods being prevented from taking place by the statute merely for the purpose of securing the duties, leaving the owner in all other respects to himself, and enabling the officer to transfer the possession of the goods to a purchaser from the owner upon the mere request of that purchaser; the effect of which is to change the constructive possession of the vendor into that of the vendee.

He also points out that in *Northey v. Field*, 2 Esp. 613, the goods were not deposited in the King's warehouse by the consignor, but were intercepted in their passage to the consignee before they came in any manner into his possession; nor was any act done by the consignor to vest the possession in the consignee.

All this seems to me to have a direct application to this case. Here the public warehouse, if that can be properly so-called, which was the purchaser's warehouse, subject only to the limited control of the officer of the Crown, was at least his warehouse, in the same sense and to the same extent as the King's stores had in the Irish case ever been the seller's warehouse. They had been placed in the bonded warehouse for precisely the same purpose, namely, to save the immediate payment of the Crown's claim. Here the vendor never was, but the vendee from the outset was, liable to this claim. Here the complete actual possession was prevented by the law, merely for the purpose of securing the duties, and the owner was in all other respects left to himself. Here also the officer could, upon the request of the purchaser, and without the slightest reference to the vendor, transfer to another.

The facts that were presented in *Orr v. Murdock*, 2 Ir. C. L. R. 9, are stated in the judgment of the learned Chief Justice of the Common Pleas, and need not be repeated. It is sufficient to remark, that although the vendor of whiskey deposited in the excise warehouse had given the purchaser a delivery order on the collector, no transfer had been made in the books of the department, but the goods remained standing in the name of the vendor. In pronouncing judgment against the right of stoppage, the Chief Baron said: "The simple question then is, whether, nothing remaining to be done by the seller or by the buyer as between him and the seller, that was done by the seller which is tantamount to giving possession. He points out the resemblance of the case to *Harman v. Anderson*, 2 Camp. 243, and adds: "There is but one element distinguishing that case from the present, viz., the liability of the the goods here to duty; but that is merely the charge of a third party, and which, as to any privity between the vendor and vendee, cannot affect their rights." Pennefather, B., said: "This is the general rule; when goods are sold which are either in warehouse at the time of sale, or are transferred to a warehouse after by the vendor, and when there is no



condition in the order of delivery, when nothing remains to be done for perfecting the delivery, such unconditional order to the vendee, and its delivery to the warehouseman, puts an end to the *transitus*." Surely there is still less room for holding the goods to be in passage, when they have been consigned to the vendee personally, received by him from the carrier and merely placed by him in the bonded warehouse for his own convenience, instead of paying the duty; where nothing remained to be done between vendor and vendee as to delivery; and where the vendor must have known that the vendee had it in his power to deal with the goods in the manner already mentioned, the moment they were deposited in the warehouse. Lefroy, B., after giving the explanation of *Northey v. Field*, 2 Esp. 613, which is cited by the learned Chief Justice, summed up his views in language that seems very applicable to this case. He says: "There remained nothing to be done on the part of the vendor, and nothing on the part of the vendee as between him and the vendor. All that remained was as between the vendee and the Crown, and cannot be held to suspend the delivery, which was complete by the act of both parties."

*Lewis v. Mason*, 36 U. C. R. 590, refers to the decision of Chancellor Walworth in *Mottram v. Heyer*, 5 Denio, 629. This question indeed appears to have arisen in several cases in the United States Courts; and, in the dearth of English authority, it seems desirable to examine their effect.

In *Donath v. Broomhead*, 7 Penn St. 301, it was decided that the right of stoppage existed where upon the arrival of goods shipped to the vendee at their port of destination, the vendee paid the freight and gave his note for the price, but in consequence of the loss of the invoice the goods were stored in the custom-house, and remained there until the dishonour of the note. But the grounds upon which that decision proceeded are of no application to the present case. The point taken was, that the officers of the law had never acknowledged the vendee's title, and the goods had never been entered. It was laid down that until the goods are entered the right of the vendee is not recognized, and

can only be so on presentation of the original invoice. The goods were not in the possession of the public officer, at the request of, or in privity with the purchaser.

In *Mottram v. Heyer*, 1 Denio 483, the material circumstances were, that the vendees of goods shipped from England to New York, having received the bill of lading, paid the freight, and entered the goods at the custom-house, they were removed to the public warehouse, and before the duties were paid the defendants became bankrupt.

Bronson, C. J., in delivering the judgment of the Supreme Court, remarked, that "the goods had reached their place of destination; the carrier had completed his work and received his reward; and the vendees besides paying the freight had entered the goods at the custom-house, where they remained at their risk and charge." Upon this state of facts, he held without any doubt, that the *transitus* was at an end before the plaintiffs attempted to regain possession. He points out that it does not appear from the report of *Northey v. Field* that the consignees had paid the freight, entered the goods at the custom-house, or exercised any other acts of ownership over the property, and that there is the authority of Lord Tenterden for the statement that the consignees had not entered the goods. He also notes that Mr. Stephens, N. P. 2587, says the goods were considered as still in the possession of the carriers and subject to their lien. The case was carried to the Court of Errors, and the decision of the Supreme Court was sustained, although not on the same grounds. Walworth, C., thought that the facts in evidence would have authorized the jury to find that the goods were not deposited in the public store under any of the warehousing provisions of the revenue laws, but had been taken there by the custom-house officers because the consignees had neglected to pay the duties and obtain a permit to land the goods. He draws a distinction between such a case and one where the goods are placed in the public store under the warehousing system and a perfect entry made, holding that in the

former case the *transitus* is not at an end, but that in the latter the goods are to be considered as having come to the possession of the vendee at the place where he intends they shall remain until he gives further order for their disposal ; that the law recognizes his right to sell or dispose of them as he pleases, subject only to the custody of the officers of the revenue for the security of the payment of the duties ; and that the *transitus* should be considered as at an end the moment the goods are thus deposited after a perfect entry for that purpose has been made.

In my opinion the effect which the learned Judge attributes to the placing of goods in the public store under the warehousing system and the making of an entry, is a legitimate deduction from the indisputable propositions of law respecting the nature and character of the right. His mode of reasoning is precisely that applied by the English Judges, where the question as to the existence of this right arises under new circumstances, and he uses precisely the same tests.

In *Mohr v. Boston & Albany R. W. Co.*, 106 Mass. 67, the goods sold were in a government bonded warehouse in Indiana at the time of the contract, but it was a part of the terms of the sale that the vendors should from time to time, at the purchaser's request, ship them to Boston and pay the storehouse charges, taxes and insurance, drawing on the purchaser for the amount. Having taken out a quantity of the goods, the vendors sent the bill of lading and the warehouseman's bill to the purchaser, upon whom they drew for the amount. The barrels were delivered to carriers for transportation to the purchaser at Boston, and while on their passage were retaken by the vendors in the exercise of the right of stoppage *in transitu*. It was held, and I have no doubt correctly held, that this right had not been lost. The decision turned upon the principle to which I have made such frequent reference, that the goods had not reached the place contemplated by the contract between the buyer and seller as the place of destination, but that something remained to be done by the vendors under the contract be-

fore they would reach that place. The ordinary result was not the less to follow from the goods remaining stored in a government warehouse, "unless the transfer to the purchaser upon the records at the warehouse is to be treated as the termination of the transit." The learned Judge proceeded to say: "But, as we have seen, the terms of the sale provided that the plaintiffs should forward the goods to Boston as their place of destination, and the storage in the warehouse was preliminary to their transit, and not the termination of it." The views thus expressed by the learned Judge would have led him to the conclusion in this case that the *transitus* was at an end.

The decisions in our own Courts have been fully commented upon in *Lewis v. Mason*, 36 U. C. R. 590, and *Graham v. Smith*, 27 C. P. 1. With regard to *Burr v. Wilson*, 13 U. C. R. 478, I think it is clearly no authority for the respondents. The four cases of goods there in question had been loaded at the custom house wharf, received by the customs officers, and placed in the custom house store, without the request or intervention of the purchaser. No entry of them had been made by him at the time the vendor claimed to exercise their right of stoppage. The case there is exactly that which Chancellor Walworth in *Mottram v. Heyer* distinguishes from such a case as the present. The decision was expressly founded on *Northey v. Field*, 2 Esp. 613, from which it was thought to be undistinguishable.

With regard to *Howell v. Alport*, 12 C. P. 375, I agree with the reasons given by my brother Burton, for thinking that it cannot be followed. It was thought that there was no substantial difference between it and *Burr v. Wilson*. No significance seems to have been given to the difference arising from the vendor's taking the goods, and entering them, and lodging them in the customs warehouse. In my observations upon other cases, I have already indicated my reasons for thinking this distinction all-important. I thus arrive at the conclusion that *Howell v. Alport* is the only decision that stands in the way of the appellant, and in my



humble judgment it is not a legitimate consequence of previous decisions, and does not rest upon any solid foundation of principle.

I venture to think that the decision we are pronouncing not only has the support of sound legal principles, but will be conducive to general convenience and the security of mercantile transactions.

No doubt, it is a persuasive equity, which restores to the unpaid vendor his goods, instead of distributing them among the general creditors. But a vendor has ample means of protecting himself, if he chooses to employ them, instead of asking a Court to lay down a rule which would enable him to seize the goods months after they had apparently been the absolute property of the vendee, subject only to the payment of duties, and which, if ruthlessly pushed to its logical results, might authorize him to follow them from bonded warehouse to bonded warehouse all over the Dominion.

I trust that the great importance of the question, and my anxiety to show the grounds upon which I join in overruling a decision entitled to so much consideration and respect, will justify in some measure the great length of my remarks.

The appeal must be allowed with costs, and judgment entered in the Court below for the defendant.

PATTERSON, J.A., and PROUDFOOT, V.C., concurred.

*Appeal allowed. (a)*

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(a) This decision has since been affirmed by the Supreme Court.

McCREA (Assignee of Rice, Insolvent) v. THE WATERLOO  
COUNTY MUTUAL FIRE INSURANCE CO.

*Insurance—Notice of additional insurance—Dissent by company—36 Vic.  
c. 44, secs. 37, 38, O., Construction of.*

R., who had insured on the 20th April, 1875, in defendants' company, on the 1st July effected an additional insurance in the Stadacona Company, and on the 5th July posted a notice to the defendants' local agent informing him of the fact. The notice also notified the defendants of his intention to effect an additional insurance in the Beaver and Toronto Mutual Insurance Company; and on the 16th July, and without any further notice, he effected such insurance. The agent received the notice on the 5th, and on the 8th forwarded it to the head office, where it was received on the 10th. The premises were destroyed by fire on the 19th, and on the 20th, after notice of the loss, the defendants notified the insured that they would not consent to the additional insurance, and that they had cancelled their policy.

*Held*, affirming the judgment of the Common Pleas, that the notice was within the two weeks allowed to the Company to dissent from an additional insurance under 36 Vic. c. 44, sec. 38, O., and that the policy was avoided.

Per PATTERSON, J. A. The insurance effected in the Beaver and Toronto Mutual Insurance Company, in pursuance of the notice of intention to insure, would not have avoided the policy if the Company had not dissented therefrom within the fourteen days.

Per HARRISON, C. J., secs. 37 and 38 should be read together, and the words "the policy of the assured shall be void at the option of the directors of the Company," in section 38, modify the word "void" in section 37, so as to make it "voidable at the option of the directors of the Company." *Seemle*, that the notice must be received by the company, and not by their local agent.

APPEAL from the judgment of the Court of Common Pleas, making absolute a rule *nisi* to enter a verdict for the defendants, reported in 26 C. P. 431. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The following were the appellant's reasons of appeal:

1. Girdlestone was the agent of the company for the purpose of receiving notice: *Wyld v. The London, Liverpool and Globe Ins. Co.*, 21 Grant 458; *Sexton v. The Montgomery Mutual Ins. Co.*, 9 Barbour 191.

2. The notice was properly sent by the post office, and the finding of Mr. Justice Morrison that the notice was received by the agent on the 5th was correct: *Papillon v. Brunton*, 5 H. & N. 518.

3. Assuming that the company were notified on the 5th of the application for the further assurance in the Beaver and Toronto, and of the insurance already effected in the Stadacona company, no notice of dissent was given to Rice within two weeks. The only notice of dissent was by letter, and the letter was not received by him until the 22nd, which was too late: *McCann v. The Waterloo Fire Ins. Co.*, 34 U. C. R. 376. The said additional insurances are to be deemed to have been assented to, and no evidence can be given to shew dissent: *Campbell v. Barrie*, 31 U. C. R. 290, 291, 292; *Nunes v. Carter*, L. R. 1 P. C. 342.

4. Secs. 37-38 of 36 Vic. ch. 44, O, must be read together. The proper construction of these sections, thus read, is, that the policy is voidable, and subsists until the insurers choose to avoid it by dissent from the further insurances. The policy is only voidable at the election of the insurers: *Potter v. The Ontario and Livingston Mutual Ins. Co.*, 5 Hill (N. Y.) Reports, p. 147; *Atlantic Ins. Co v. Goodall*, 35 N. H. 331; *Smith v. Saxton*, 6 Pick. 483; *Byran v. Child*, 5 Ex. 368; *Young v. Billiter*, 8 H. L. 682.

5. The insurers cannot rely upon a cancellation under sec. 26, because the cancellation under that section would have been after the happening of the loss.

6. The plaintiff was entitled to recover.

The respondents' reasons against the appeal were:

1. Girdlestone was not the agent of the respondents for the purpose of receiving notice of further insurance: *Hendrickson v. The Queen Ins. Co.*, 30 U. C. R. 108; *S. C.*, in Appeal, 31 U. C. R. 547.

2. The notice should have been given to the company through the secretary thereof.

3. The company notified its dissent from the further insurance in writing within two weeks after the receipt of the notification of the further insurance.

4. Girdlestone was agent of the appellant, and not of the company, in respect to the notification of the further insurance.

The case was argued on the 22nd December, 1876. (a).

*Bethune*, Q. C., for the appellant.

*M. C. Cameron*, Q. C., with him *Bowlby*, for the respondents.

The arguments of counsel and cases cited fully appear in the reasons for and against the appeal.

February 20th, 1877 (a). BURTON, J.A.—I am of opinion that this appeal should be dismissed. I base that opinion upon the short ground that a double insurance subsisted in the defendants' company and another office, or in two other offices, without the consent of the directors.

The Act under which the defendants were incorporated points out that the required consent shall be signified by endorsement on the policy, signed by the secretary, or otherwise acknowledged in writing, with a further provision that upon a notification in writing to the company by the assured of his intention to insure, or of his having insured, an additional sum on the same property in some other company, the additional insurance shall be deemed to be assented to unless the company so notified shall, within two weeks after the receipt of such notice, signify to the party in writing their dissent.

It is clear, I think, that the only positively safe course for the insured to pursue is, to procure the assent of the company before effecting the further insurance.

The expiry of the two weeks after the reception by the company of a written notification of the further insurance, is equivalent to, and a substitute for, the endorsement on the policy, or other written acknowledgment referred to in the 37th section.

In the present case, although other insurances subsisted at the time when the fire occurred, those insurances had neither been endorsed or acknowledged in writing, nor had they been constructively consented to by a failure of



the defendants to dissent within the prescribed period after the notification in writing of their existence.

This assent was a condition of the insurance, and without an allegation and proof of the performance of that condition the plaintiff was not entitled to recover.

This might have been established either by shewing an endorsement on the policy or an acknowledgment in writing under the 37th section, or by evidence of a notification to the company of the existence of the additional insurances, and a failure on the part of the company to notify their dissent in writing for the period mentioned in sec. 38.

The plaintiff failed to establish a compliance with this condition, and must therefore fail.

It is not necessary to consider how far the agent was authorized to receive such a notification on behalf of the company, and it might be as well, both for the security of such companies and of the public with which they deal, that a greater degree of care and caution were taken in defining the powers of the agent in his appointment, and in furnishing him with written instructions clearly pointing out his duties and limiting his authority, and that this should be brought to the notice of the assured upon the face of the policy.

The secretary, it is true, states that the agents had no authority to give such consent, and that their duties were of a limited character; but it does not appear that the appointments of the agents were in writing, or that they were furnished with instructions defining their powers, and the agent himself says that he had no specific instructions, but was told "that he was appointed general agent for the company." As the fire in this case occurred within two weeks from the date of his receiving the notification, we are not called upon to decide whether an agent appointed in this loose and general way would have authority to receive this notification; but on the broad ground that the assent of the directors to the double insurance was a condition precedent to the plaintiff's right to recover, we think the judgment of the Court of Com-

mon Pleas was correct, and that the appeal should be dismissed with costs.

PATTERSON, J. A. I concur entirely with my brother Burton in the views he has expressed. I should not have added anything to what he has said, were it not that I desire particularly to state what I do not decide.

The question of the sufficiency of the notice delivered to Girdlestone, the agent, and the effect of that act as being delivery to the company, have been discussed. In the view which we take it is unnecessary, as it was also unnecessary in the Court below, to decide that question. It is one which may become of essential importance in some future case, and I desire to avoid prejudicing its full discussion and deliberate decision by any unnecessary expression of opinion, or even by tacitly indicating assent to, or dissent from, the application to this statute of the principles maintained by any of the learned Judges who took part in the decision of *Hendrickson v. Queen Assurance Co.*, 31 U. C. R. 547. The question arose there upon a policy which contained provisions that have no equivalent in the statute; and related to a notice which, unlike that before us, was effective in its operation on the policy by the mere fact of its delivery, wherefore the decision of that case would not be necessarily an authority in this.

I do not concur in the view suggested by one of the learned Judges in the Court below, that if a regular notice is given, under sec. 38, of intention to effect an insurance, and no dissent is expressed within two weeks, it can make any difference whether the insurance is effected in pursuance of the notice on the thirteenth day after the notice, or on the fifteenth day. If notice of intention to insure, undissented from, works a statutory assent to the insurance which is effected after the expiration of the two weeks; and if an insurance effected contemporaneously with the notice given of it is deemed to be consented to when the two weeks expire, I cannot understand on what principle the assent is not to be extended to the policy which is

effected during the currency of the notice. I differ in this particular from Mr. Justice Gwynne, probably because I am unable to see that the effecting of the second policy alters the condition of things to the prejudice of the company, when its only effect on the first policy is to avoid it or suspend its operation until the assent is given.

My decision is based on the facts that the two weeks did not, on the construction of all disputed questions most favourable to the defendants, expire until after the fire had occurred; and that when the fire occurred there existed a double insurance without the consent of the directors. That consent might have been signified in the manner provided in sec. 37, or deemed to have been given under the circumstances mentioned in sec. 38. These are the two modes provided for furnishing evidence of the assent. In the one case, the assent would date from the endorsement; in the other, from the time it was first deemed to be given, viz., from the expiration of the two weeks. The effect of the double insurance in the absence of consent was, therefore, that when the fire occurred the insurance was void. Mr. Justice Galt has pointed out the difficulty in construing sec. 38. There is undoubtedly a singular confusion in its structure. I do not, however, think it requires disentangling in order to deal with the question presented to us. If, after a fire, the company elected to consent to a double insurance effected before the fire, as might be done after a partial loss, I see nothing to prevent their doing so. It would be a matter of contract. They could do it unconditionally, and as of an earlier date, and pay the loss if so disposed; or they could refuse their assent, except on terms of excluding the loss that had occurred. The matter would be in their own hands. In case of a partial loss, also, I apprehend the statutory assent would result from the lapse of two weeks without dissent. But it would not relate back. It would not enable the assured to say that at the time of the fire the double insurance subsisted with the assent of the directors. It is noticeable that sec. 37 does not say the *policy* shall be void. It

says the *insurance* shall be void. If at the end of two weeks the assent is presumed, and is taken from that date to restore validity to what was void before, what is it that is restored? The insurance? But can there be an insurance of what has ceased to exist? There may be no substantial difference between the words; but, adopting that which is used, the company may fairly read the section as having this effect: When you effect double insurance, you cease to be insured with us; when you get our consent, you are insured again.

I agree that the appeal must be dismissed.

Moss, J. A.—I am of the same opinion. I desire to place my judgment entirely upon the circumstance that, adopting the most favourable view for the plaintiff of all disputed questions, his claim cannot be sustained, because at the time the loss occurred there subsisted a double insurance without the consent of the directors.

That was the case, whether “void” is or is not to be read as voidable, and the result is the same, whatever construction may be adopted. That was the case whether Girdlestone had or had not authority to receive the notice, and whether or not the company is to be deemed to have been notified on the 5th of July, or at a later date. Giving the plaintiff the benefit of his contention on all these points, the fact remains that at the time of the fire there was a double insurance without the consent signified in the prescribed manner, and before the expiration of the time after which consent might be implied.

The plaintiff fails on the short ground that he cannot prove that at the time of the loss the double insurance existed by the express consent of the directors endorsed, or by their implied assent arising from a silence of two weeks after notification.

I advisedly abstain from expressing an opinion upon any of the other points discussed in this case.



HARRISON, C. J.—The plaintiff is the assignee in insolvency of Alfred E. Rice, who effected an insurance against fire with the defendants on the following:—

A frame furniture factory.....	\$500 00
Fixed and movable machinery, belting and gearing therein .....	300 00
Engine and boiler therein.....	200 00
	<hr/>
	\$1,000 00

The head office of the defendants is at the village of Waterloo, in the County of Waterloo, Ontario.

The risk was taken by G. W. Girdlestone, the local agent of the defendants at Windsor, Ontario.

The policy is dated 20th April, 1875, and is for the term of three years, ending on 15th April, 1878.

On 1st May, 1875, Alfred E. Rice, the assured, effected an insurance against fire in the sum of \$2,000, in the Stadacona Life Insurance Company, on the property mentioned in the policy, and on stock contained in the insured building.

On 5th July, 1875, written notice of this insurance, and of his intention to insure for \$2,000 additional in the Beaver and Toronto Mutual Insurance Company, was sent to G. W. Girdlestone, the local agent of the company at Windsor, and according to the finding of the learned Judge, who tried the cause without a jury, was received by the local agent on the same day.

The letter of 5th July, 1875, did not reach the head office of the defendants till 10th July, 1875.

On 13th July, 1875, a letter was written from the head office to the local agent, asking for his report on the effect of the additional insurance on the risk.

On 16th July, 1875, the local agent wrote to the head office saying that, under the altered circumstances, the company would be as well without the risk, and recommending the disallowance of the additional insurance, or cancellation of the policy.

On 16th July, 1875, Alfred E. Rice succeeded in effecting another insurance to the amount of \$500 in the Beaver

and Toronto Mutual Fire Insurance Company, on machinery, belting, gearing, engine and boiler, mentioned in the policy of the defendants, of which only notice of intention to insure was given at the same time as notice was given of the insurance in the Stadacona Fire Insurance Company.

On 19th July, 1875, about ten o'clock at night, the property insured was consumed by fire.

On 20th July, 1875, the local agent telegraphed the secretary of the defendants, at the head office, of the loss.

On the same day, after the receipt of the telegram, a letter was addressed to Rice by the secretary of the defendants, refusing to consent to the additional insurance, returning the premium note, enclosing \$16.20, being the unearned premium, and cancelling the policy.

This action was commenced on 9th December, 1875.

The question which arises on these facts is, whether the policy on which the plaintiff sues can as against the defendants be treated as a valid and a subsisting policy for the purposes of the suit.

The decision of this question must depend on the interpretation to be placed on sections 37 and 38 of 36 Vic. ch. 44, O.

The first and most important rule in the construction of a statute is, that it is to be assumed in the first instance that the words and phrases are used in their technical meaning, if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless it appears upon an examination of the rest of the law to which the passage under consideration belongs, that they were used in a different sense: *Maxwell* on Statutes, 2, 3, and case in note (a).

The sections 37 and 38 of 36 Vic. ch. 44 are as follow:

37. "If any insurance subsists by the act or with the knowledge of the insured in the company and in any other office at the same time, the insurance in the company shall be *void*, unless the double insurance subsists with the con-

sent of the directors signified by endorsement on the policy, signed by the secretary or other officer authorized to do so, or otherwise acknowledged in writing."

38. "Whenever notification in writing shall have been received by a company from an applicant for insurance, or from a person already insured, of his intention to insure, or of his having insured an additional sum on the same property in some other company, the said additional insurance shall be deemed to be assented to, unless the company so notified shall within two weeks after the receipt of such notice signify to the party in writing their dissent; and in case of dissent the liability of the insured on the premium note or undertaking shall cease from the date of such dissent on account of any loss that may occur to such company thereafter, *and the policy of the assured shall be void at the option of the directors of the company.*"

The word "void" as used in sec. 37, and the words, "the policy of the assured shall be void at the option of the directors of the company," are the words in these sections which demand interpretation.

If it were not for the use of the latter words, I would be inclined to agree in the conclusion arrived at by the Court of Common Pleas, that the word "void," as used in sec. 37, means absolutely void, and not simply voidable: See *Merritt v. The Niagara District Mutual Fire Ins. Co.*, 18 U. C. R. 529. See further *Simpson v. The Accidental Ins. Co.*, 2 C. B. N. S. 257; *West Mass. Ins. Co. v. Piper*, 10 Mich. 279; *Security Ins. Co v. Fay*, 22 Mich. 467; *New York Central Ins. Co. v. Watson*, 23 Mich. 486.

But if the words, "shall be void at the option of the directors of the company," as used in sec. 38, be read in connection with the word "void" as used in sec. 37, they must be held to control and modify the meaning which might otherwise be placed on the word "void" standing by itself.

Owing to the poverty of our language, the same word may have different meanings in different places—the word may have a primary and a secondary or other meaning, the

latter generally to be ascertained by reference to the context.

The primary meaning of the word "void" is empty. By user it has grown to mean "null—of no force or effect." But in Acts of Parliament, deeds, and other legal documents, it is also often used as meaning not absolutely void, but voidable at the option of one of the parties affected.

A familiar illustration of the latter meaning will be found in the long train of authorities which in the case of leases establish that a proviso declaring a lease "null and void" is to be construed as meaning "void at the option of the lessor."

But this rule of construction is by no means restricted in its application to leases.

The cases under statutes, and they are numerous, will be found collected in Maxwell, 184, *et seq.*

The most instructive English case is *Billiter v. Young*, 6 E. & B. 1; S. C. 8 H. L. 682.

The most instructive Irish case, and the most instructive of all the cases on the point, is *Armstrong v. Turquand*, 9 Ir. C. L. R. 32.

Reference may also be made to the following United States decisions: *State v. Richmond*, 6 Foster 232; *Smith v. Saxton*, 6 Pick. 483.

The rule modifying the construction of the word "void," according to the intention of the parties, is particularly applicable to policies of insurance, the conditions of which usually declare the contract void for acts of omission or commission specially provided against by the underwriters. See *Wing v. Harvey*, 5 DeG. McN. & G. 265; *Supple v. Cann*, 9 Ir. C. L. R. 1; *Kreutz v. Niagara District Mutual Ins. Co.*, 16 C. P. 131; S. C., *Ib.* 573; *Storms v. The Canada Farmers Mutual Ins. & Co.*, 22 C. P. 75; *Livingstone v. The Western Ass. Co.*, 14 Grant 461; *Smith v. The Commercial Ins. Co.*, 30 U. C. R. 69; *Atlantic Ins. Co. v. Goodall*, 37 N. H. 332, 328; *Potter v. Ontario and Livingstone Mutual Ins. Co.*, 5 Hill N. Y. 147, 151.

The question is one of intention and of substance, and not merely of grammar or of words, and is really this—



which of two modes of operation, of either of which the words are susceptible, will best effectuate the intention of the parties, that which annuls the contract *in invitum*, and beyond the control of the person for whose benefit the clause was intended, or that which will make it void only in the event of that person thinking it for his benefit to insist? The real controversy is not whether the grammatical sense of the word "void" shall be altered, but whether the intention of the parties does not require that its operation shall be *postponed*. See per Christian, J., in *Armstrong v. Turquand*, 9 Ir. C. L. 47.

The true office and function of clauses of the kind in policies of insurance is merely to serve as a shield for the protection of the party who inserts them, if he shall think proper so to use them : *Ib.* p. 61.

I agree with the learned Judges of the Court of Common Pleas in thinking that sections 37 & 38 of 36 Vic. ch. 44, must be read together ; but the conclusion which I draw from so reading them is, that the words, "the policy of the assured shall be void at the option of the directors of the company" control all that goes before them either in section 37 or section 38, and modify the meaning of the word "void" in section 37, so as to make it "voidable at the option of the directors of the company."

The latter words as placed at the end of section 38, if limited in their operation to that section, would be senseless, but extended to both sections have a clear and rational meaning—that is to say, that the persons for whose benefit the condition is made may, if they see fit, waive the condition : in other words, that the policy is not void, but voidable at the option of the insurance company.

This was the meaning of the words contained in the original Act, Consol. Stat. U. C. ch. 52, secs. 28 and 29, as amended by 27-28 Vic. ch. 38, sec. 4.

I do not, in the language used in the new Act, discern any intention on the part of the Legislature to change the old law. On the contrary, it appears to me that by the retention of the words at the end of sec. 38 which I have

quoted, the intention is to retain the old law. The only difficulty arises from the fact that the words at the end of sec. 38 have in some unexplained manner been allowed to wander from company where they were well known into company where they are so little known as not to be recognized without some effort.

Thus far, but no further, can I go with the appellant's counsel in his able argument before us.

The condition against further insurance is, in the interest of the public, one to be favoured.

There is no condition more important than this for the prevention of fraud, and there is no fraud more likely to be attempted by a fraudulent and dishonest insurer than that of procuring an over insurance of his property, thus diminishing any inducement to take every reasonable precaution against accidental fire, if not operating as an incentive to something worse: per Draper, C. J., in *Hendrickson v. The Queen Ins. Co.*, 31 U. C. R. 552.

Unless the condition be substantially if not literally complied with, effect should be given to it, and the policy avoided at the instance of the company: *Noad et al. v. The Provincial Ins. Co.*, 18 U. C. R. 584; *Weinaugh v. The Provincial Ins. Co.*, 20 C. P. 405. See further *Jacobs v. The Equitable Fire Ins. Co.*, 19 U. C. R. 250, 254; *Osser v. The Provincial Ins. Co.*, 12 C. P. 133; *Forbes v. Agawan Ins. Co.*, 9 Cush. 470; *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. 265.

Where an insurance subsists by the act or with the knowledge of the insured in any other office at the same time, unless the double insurance subsists with the consent of the directors, signified by endorsement on the policy, signed by the secretary or other officer authorized to do so, or otherwise acknowledged in writing, the policy, as I read it, is, to be void, in the option of the directors of the company: sec. 37.

The exception is where, after notification in writing of an intention to insure, or of an insurance actually effected, and the lapse of two weeks after the receipt of notice, the

company omit to signify in writing their dissent, in which case assent is presumed, and endorsement on the policy apparently unnecessary.

It is not only necessary that the notice should be given to, but received by the company: *McCann et al. v. The Waterloo Ins. Co.*, 33 U. C. R. 376; but it is argued that notice received by the local agent is notice received by the company. While notice to an agent in the course of his employment is generally deemed notice to his principal, it does not follow that all notices given to the agent are notices to the principal. The question is, whether the local agent represented the company for the purposes of sec. 38.

There are several United States authorities which more or less support the appellant's argument addressed to us on this point: *Schenck v. The Merchants' Ins. Co.*, 4 Zabris. N. J. 447, 453; *McEwan v. Montgomery County Mutual Ins. Co.*, 5 Hill N. Y. 101; *Boehen v. Williamsburgh Ins. Co.*, 35 N. Y. 131. But these decisions are opposed to others of equal authority in the United States: *Security Ins. Co. v. Fay*, 22 Mich. 457; *Peckner v. The Phoenix Ins. Co.*, 6 Lansing N. Y. 411; *Potter v. Ontario Ins. Co.*, 5 Hill N. Y. 147, 151; *Worcester Bank v. Hartford Ins. Co.*, 11 Cush. 265; and what is more to the point, are, I think, opposed to the opinions of the majority of the Judges of this Court as formerly constituted in *Hendrickson v. The Queen's Ins. Co.*, 31 U. C. R. 547.

The better opinion would appear to be, that in the absence of express authority to the local agent, or of implied authority to him to be presumed by reason of his previous dealings with the knowledge of the company, the notice of further insurance must be given to the company themselves or to such of their officers as have the power to exercise the option of cancelling the policy and of returning the proportional part of the premium: *Hendrickson v. The Queen Ins. Co.*, 30 U. C. R. 108; affirmed, 31 U. C. R. 597. See further, *Linford v. The Provincial Horse and Cattle Ins. Co.*, 11 L. T. N. S. 330; *Xenos et al. v. Wickham*, L. R. 2 H. L. 296.

This opinion, if correct, excludes the contention that the notice given to the local agent on the 5th July, 1875, was a sufficient compliance with the condition so as to fix the company with knowledge from that day. And as the fire clearly took place within two weeks from the time that the notice reached the head office there cannot, I think, be any recovery against the defendants.

But supposing this view wrong, and the contention of the appellant right on this point, all difficulty in the way of the plaintiff's recovery is not removed, because of the insurance on 16th July, 1875, as to which no notice whatever was given, except the notice of intention to insure given on the same day as the notice of the prior insurance.

Now the statute makes provision either for the giving of a notice of intention to insure, or of an actual insurance. From the day either notice is received by the company the statute allows the company two weeks within which to assent or dissent from the contemplated or actual insurance.

It is not pretended that notice of the insurance of 16th July, 1875, was given to the company or any of its officers. For all that appears the company had no notice of that insurance till long after the loss.

It is not declared in the statute that the assent or dissent of the company must be expressed before the happening of the loss. Such a contention, if raised, could not for a moment be allowed to prevail. The effect of yielding to it would be, that if the assured could succeed in concealing the existence of the additional insurance till after the loss, the company would lose all the legal protection expressly provided for them. See *Bruce v. Gore Mutual Assurance Co.*, 20 C. P. 207.

The rights of the underwriters are not to be abridged because of the neglect or omissions, designed or otherwise, on the part of the assured, to do that which, under particular circumstances, is essential to the validity of his policy.

The result is, that if a loss happen after additional insurance, and during the two weeks after notice of additional



insurance the underwriters at any time within the two weeks, whether before or after the loss, elect to rescind the contract, the remedy of the assured is thereby gone. See *Butler v. The Waterloo Mutual Fire Insurance Co.*, 29 U. C. R. 135, 553, 538.

In short, "the assured always runs the risk on effecting a second insurance of getting the defendants' assent under the condition": Per Hagarty, C. J., in *Weinaugh v. The Provincial Ins. Co.*, 20 C. P. 410.

Of course, as said by the same learned Judge in the same case, "Such a construction in the case of a notice not given till after a loss, must practically in most cases defeat all remedy, as the underwriters would be too certain to avail themselves of their right to avoid their contract when their assent at once involves them in the payment of all or part of the sums insured."

So long as there was no provision by law for giving notice of intention to insure, such a construction might in some cases work hardship. See *Schenck v. The Mercer County Ins. Co.*, 4 Zabris. N. J. 447; *Loring v. The Manufacturers' Ins. Co.*, 8 Gray 28; but now that the notice may, in the case of mutual insurance companies, be not only of an insurance effected, but of intention to insure, the assured has the remedy in his own hands, and if he neglect to make use of it, he cannot blame others for the proper exercise of their legal rights to his detriment.

In my opinion the appeal must be dismissed, with costs.

*Appeal dismissed, with costs.*

## WOOD v. McALPINE.

*Assignment of chose in action—35 Vic. cap. 12, O.—Meaning of assignee—Amendment.*

An assignee, in order to obtain the benefit of 35 Vic. c. 12, O., must take the beneficial interest in the claim assigned. He cannot sue in his own name where the assignment has been made only in order to enable him to bring the action.

An amendment by adding the name of the assignor as a plaintiff was refused at this stage, as such an amendment could only have been made on payment of all costs, and this would have been of no practical advantage to the assignor, who could still sue in his own name.

APPEAL from the decision of the Court of Common Pleas.

The declaration commenced with the statement that the plaintiff, assignee under the Insolvent Act of 1869 of the estate and effects of Frank Munro, an insolvent, sued the defendant; and it contained three counts.

The first was for money payable by the defendant to the plaintiff, as such assignee, for goods sold and delivered by Munro to the defendant before he became insolvent.

The second was for money payable by the defendant to the plaintiff, as assignee, for goods sold and delivered by the plaintiff, as such assignee, to the defendant.

The third alleged a debt from the defendant to Smith for goods sold and delivered, and money lent by Smith, and an assignment in writing from Smith to the plaintiff, as assignee as aforesaid.

Several pleas were pleaded, but it is unnecessary to specify them, as at the trial the plaintiff's counsel abandoned the first two counts and relied solely upon the third.

The cause was tried before Harrison, C. J., and a jury, at Toronto, at the Fall Assizes of 1875.

It appeared that one Munro, who was carrying on business at Lindsay, became insolvent in September, 1874, while largely indebted to one Smith, and the present plaintiff was duly appointed his assignee. Very soon afterwards Smith proposed to the creditors to purchase the insolvent estate at 60 cents in the \$ on the liabilities, payable at three and six months, which proposition was accepted. Notes

were given by Smith to all the creditors who proved their claims, and the estate was handed over to him. The notice required by the Insolvent Act of 1869, as preliminary to a sale *en bloc*, had not been given. After purchasing the estate, Smith engaged Munro, at a salary, to carry on the business for him, and supplied large quantities of goods to be sold at the store. Munro seemed to have cherished some hope of getting back the business from Smith, who was a relative of his; but such an expectation did not seem to have received the least support from anything said or done by Smith. The defendant was also a creditor of Munro, but instead of proving his claim in the insolvency proceedings, he made a private arrangement with him, based apparently upon the notion that Munro would get back the business. While Munro was acting as Smith's agent, he supplied the defendant with the goods and lent him the money which formed the subject of this action, and which were the property of Smith. Munro said that when the defendant got these goods, it was on the understanding that he must get credit for them on his account after Munro got the business back in his own hands.

On the 9th July, 1875, before the commencement of this suit, Smith made a written assignment to the plaintiff for the expressed nominal consideration of one dollar of all the "debt, claim, demand, and chose in action," which he then had against the defendant for goods sold and delivered between the 1st of October, 1874, and the date of the assignment, and for money lent. This assignment was made simply for the purpose of bringing the suit in the plaintiff's name.

It was objected, on behalf of the defendant, that the assignment was not within the provisions of the statute 35 Vic. ch. 12, O., upon which the plaintiff relied, because the plaintiff was a mere nominee of Smith, and did not possess at the time of action brought the beneficial interest in the chose in action attempted to be assigned; and, moreover, that the action was by the plaintiff as official assignee in

insolvency, in which character he could not accept this assignment.

The learned Chief Justice refused to nonsuit, but reserved leave to the defendant to move on these objections, and the defendant called no witnesses.

The jury found for the plaintiff.

In Michaelmas term, 29 November, 1875, *M. C. Cameron*, Q. C., obtained a rule *nisi*, pursuant to leave reserved.

In Easter term, *J. J. Foy* shewed cause.

*M. C. Cameron*, Q. C., contra.

March 10th, 1876. HAGARTY, C. J. C. P., delivered the judgment of the Court.

We are asked by the plaintiff to strike from the record the counts on which the defendants obtained a verdict, on payment of costs, and to allow the verdict obtained by the plaintiff on the third count to stand.

The count, as framed in the record, does, we think, shew an assignment of the alleged chose in action to the plaintiff, as assignee in insolvency of Munro.

The evidence shews very clearly that the assignment was not made to the plaintiff as a beneficial plaintiff for his personal benefit, or as a matter of actual sale of a chose in action. It is expressly stated that it was merely for the purposes of this suit, and seems clearly so made, because he was the assignee in insolvency.

It could only be under our Ontario Act that he can possibly sue in his own name. As assignee, he has no interest in the claim of Mr. Smith against the defendant.

Mr. Smith purchased all these goods, and, so far as we can judge from the evidence, seems rightly entitled to recover their value from the defendant.

The Act, 35 Vic. ch. 12, sec. 1, O., says that the assignee shall sue in his own name.

Section 3 declares (among other things) the "assignee" shall be a person "possessing at the time the action is brought a beneficial interest" in the chose in action



assigned, and having "the right to receive and to give an effectual discharge for the moneys," &c.

We hardly see that the plaintiff comes within this description. On this evidence he can hardly be said to have the beneficial interest in this claim. From his own account and the other evidence, we think he had no interest of any kind beyond being the nominee, merely to bring this suit, of the person beneficially interested.

We must hesitate long before holding, either that the nominal transfer here made comes within the statute, or that a person holding this official position can take such an assignment and sue thereon, as in this record, for the professed benefit of the estate.

It would be wrong, we think, to allow a recovery on this third count on this evidence.

If the plaintiff still thinks that he can sue in his own name under the statute, he may still adopt that course.

The rule will be absolute to enter nonsuit.

*Rule absolute.*

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The plaintiff appealed.

The following were the appellant's reasons of appeal:—

The plaintiff submits that the judgment is erroneous in this—that the plaintiff was entitled to retain his verdict and recover, for the following reasons:

1. That under 35 Vic. ch. 12, O., a debt is assignable, even though the assignee has not the beneficial interest. The words of the statute are, "*Assignee shall include any person, &c., and possessing at the time of action brought the beneficial interest, &c.*" And this does not exclude all persons not having such interest: 32 Vic. ch. 36, sec. 3, O. The person to whom a debt is assigned by writing can sue, no matter what his interest, as the endorsee of a note can, or the holder of a transferred bond or debenture under section 2 of said Act. The effect of this Act is to make a debt negotiable. The decisions on this statute take a wide and

liberal view of its operations: *Blair v. Ellis*, 34 Q. B. 466; *Wellington v. Chard*, 22 C. P. 518. Even before this Act a valuable consideration was not in equity, in later times, held necessary to support an assignment, provided the instrument of assignment was complete in form: *Story on Contracts*, sec. 470, 5th ed.

2. That if the right of action was not in the plaintiff *as assignee*, it was in him personally, and an amendment should have been and should be allowed by striking out the character in which he sued, and striking out the first and second counts so as to avoid misjoinder of counts: *Bullen & Leake*, p. 11, 3rd ed.; 1 *Chitty*, Pleading 426; *Kightly v. Birch*, 2 Maule & S. 533; *Kitchenman v. Skeel*, 3 Ex. 49.

3. That under sections 8 and 50 of the Administration of Justice Act of 1873, and sections 11 and 11a of Administration of Justice Act of 1874, the plaintiff should be allowed to keep his verdict, so that final and complete justice may be done in the matters in question. The defendant has in his pleas to the third count raised the same defences as if the action had been by Smith, and these pleas have been tried and found against the defendant. If necessary, Smith may now be added as a party under said 8th section, so that the proceedings may be binding on him.

4. That Smith, having paid all the creditors 60 cents on the \$, stands in the place of such creditors. The plaintiff and Smith were thus the only persons having any legal or equitable, or beneficial interest in the assets of the insolvent Munro. Smith having transferred his title to the plaintiff, vested the different interests and combined the two titles in one person, the plaintiff, so as to enable him to recover, and thus debarred the defendant from objecting that the suit was not brought by the proper party. Smith and plaintiff being the only persons interested in the debt sued for, there can be no objection taken to Smith giving the right to sue to plaintiff.

5. That the plaintiff is entitled to a verdict on the second count if he fails on the third. The Insolvent Act of 1869

allows the sale of an insolvent estate *en bloc* if certain formalities are observed. Smith, being unable to shew these, could not sue in his own name. Defendant would meet him with the objection that the right of action was in Wood.

The respondent's reasons against the appeal were as follows:

1. The judgment of the Court of Common Pleas was right in ordering a nonsuit, the plaintiff having no beneficial interest in the demand.

2. The assignment was in terms made to the plaintiff as official assignee, and that character could not be struck out of the third count of the declaration without making a variance between the count and the assignment proved in support of it.

3. The plaintiff could not in his official character take an assignment of a chose in action under the circumstances detailed in evidence, the estate having passed out of him.

4. He could not as such assignee take an assignment under the facts proved in this case at all.

5. The goods were received by the defendant not upon the terms that he should pay for them on request, but that he should receive credit for the amount on his claim against the estate. No assumpsit to pay on request therefore arose, and the nonsuit was right, the estate being in fact indebted to the defendant.

6. The defendant's claim against the estate was greater than the plaintiff's claim, assuming the plaintiff properly and legally to represent Smith, and the defendant had a right to set it off in equity against Smith.

7. The undertaking of Smith to pay the creditors sixty cents in the dollar was binding whether he knew the extent of the claims against the estate or not, and his not knowing of the defendant's claim did not entitle him to dispute his liability, the claim being valid.

8. Munro was the agent of Smith under the Factors' Act, and the said Munro had power to bind the said Smith by pledging the goods for the debt due the defendant.

9. The defendant's sixth plea was proved.

10. The Court was not bound to amend the record as asked by the plaintiff, when he did not apply to amend at *Nisi Prius*, and Smith is not by the nonsuit deprived of any action he might otherwise have.

11. The question in issue was the plaintiff's right to recover, and the count could not have been amended by the insertion of Smith's name without his consent in writing.

And the respondent refers to the following authorities:—*Bullen & Leake*, 3rd ed., 11; *Corner v. Shew*, 4 M. & W. 163; *Corbett v. Packington*, 6 B. & C. 268; *Hostrawser et al. v. Robinson*, 23 C. P. 350; *Humber v. Hunter*, 12 A. & E. 310.

The case was argued on the 18th December, 1876 (a).

*C. Robinson*, Q. C., with him *J. J. Foy*, for the appellant. The statute 35 Vic. ch. 12, does not require the beneficial interest to pass to the assignee. The third section merely says that the "assignee" shall *include* any person possessing the beneficial interest, &c., but this does not *exclude* all others. The Assessment Act, 32 Vic. c. 36, s. 3, specifies what the term land shall include, but it is plainly intended to include whatever else would come under the word. Under section 2 of the Act a bondholder can sue without having any beneficial interest, which shews that this is the correct interpretation of the Act. The Act was intended to apply to any one able to give a binding receipt for the debt: 31 & 32 Vic. ch. 86, and 30 & 31 Vic. ch. 144, Imp.; *Dicey* on Actions, 235. We should be allowed to amend by adding Smith as a party plaintiff. The Chief Justice held that the assignment was good, or the application would have been made at the trial. The amendment can be made now without any injustice being done, under the Administration of Justice Act, 1873, secs. 8 and 50, and the Administration of Justice Act, 1874, secs. 11 and 11a, as the defendant has raised the same defence in his pleas to the third count as if the action had been by Smith, and they have been found against him.

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(a) *Present*.—BURTON, PATTERSON, MOSS, JJ. A., and PROUDFOOT, V. C.



*M. C. Cameron*, Q. C., for the respondent. It is clear that the object of the Act was, to enable an assignee taking the beneficial interest in a debt to bring an action in his own name; but it was never intended to apply such a case as the present, where it is admitted that the assignment was merely nominal. The estate had passed out of Wood before the assignment, and he could not therefore take an assignment of the debt in his official character. The action should have been for deceit and not in *assumpsit*: *Ferguson v. Carrington*, 9 B. & C. 59; *Selway v. Fogg*, 5 M. & W. 83. The amendment was not asked for at the trial, and cannot now be made.

*Robinson*, Q. C., in reply. This is the first time that the objection has been raised that the action should have been in tort. We are however at liberty to waive the tort, and sue in *assumpsit*.

February 20, 1877 (*a*), Moss, J. A.—The first point urged before us was, that the Court had placed a narrow and illiberal construction upon the statute, which was intended to make a debt assignable to any person, whom the owner chose, without conferring any beneficial interest.

This argument, which was largely founded upon a verbal criticism of the Act, does not appear to be tenable. We think there is no reasonable room for doubt that the object of the Legislature was, to enable a person, who had become beneficially entitled to a chose in action, to sue upon it at law in his own name, instead of being obliged to use the name of his assignee, or to resort to a court of equity. The first section enacts that every debt and chose in action arising out of contract shall be assignable at law by any form of writing, and the assignee thereof shall sue in his own name.

The third section is: "*Assignee* shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to

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(*a*) *Present*.—BURTON, PATTERSON, and MOSS, JJ. A.; and PROUDFOOT, V. C.

a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys, or the charge, lien, incumbrance, or other obligation thereby secured."

The plaintiff's argument is, that the object of this section is not to define the meaning of the term "assignee" for the purposes of the Act, but to enumerate classes of persons who, without excluding others, shall be certainly deemed to be *included*.

The very use of the term "include," it is said, implies that other persons besides those possessing at the time of action brought the beneficial interest may be assignees. We do not accede to this view. We think that the object of the section was to define the term "assignee" for the purposes of the Act. It states the incidents which should be attached to a person who seeks the benefit of the provisions of the statute.

If any doubt might otherwise have been felt, it seems to us to be completely removed by the sixth section, which provides that in case of any assignment in writing, as aforesaid, and notice given to the debtor, the assignee shall hold and enjoy the chose in action, free from any claims, defences, or equities which might arise after such notice as against his assignee. This manifestly implies that the assignee shall be the absolute owner, in whom the beneficial interest is vested, and not a mere nominee of the assignor. The terms of the fifth section point to the same conclusion.

We think that sound policy requires us to place this construction upon the statute. We should pause long before imputing to the Legislature the intention of permitting the holder of a doubtful claim to transfer it for the mere purpose of litigating it in the name of the assignee, and of avoiding personal responsibility. That would invite serious abuses of the law, and only the clearest language would warrant us in placing upon the statute an interpretation likely to lead to such evil consequence. Although no im-

proper motive actuated the parties in this transaction, but everything was done in good faith, that does not enable us to vary the construction.

The plaintiff applied for leave to amend by adding Smith as a party plaintiff. We think that under the circumstances shewn to exist it would be impossible to accede to this application, without sending the case down for a new trial, and making the plaintiff pay all the costs from the former trial inclusive. This would be of little advantage to Mr. Smith, and we see no good reason for differing from the Court on this point.

The appeal must be dismissed with costs.

PROUDFOOT, V. C.—I think the judgment of the Court of Common Pleas is right, and ought not to be disturbed.

The statute making choses in action assignable (35 Vic. ch. 12, O.,) by sec. 1, says that every debt and *chose in action* arising out of contract shall be assignable, and the assignee thereof shall sue in his own name. The third section interprets the word assignee to "include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to a *chose in action*, and possessing at the time of action brought the beneficial interest therein," &c.

This enlarges the operation of the first section to the extent of making it apply to assignments that might have been made prior to its coming into force, gives it so far a retrospective operation, and it requires not only these, but assignments plainly within the first section, to carry the beneficial interest to the assignee, to enable him to obtain the benefit of the Act. In cases of assignments where the assignor retains his interest, there are many reasons why the suit should still be brought in the name of the assignor that do not apply to the case of an assignee who has the beneficial interest.

In the latter case the assignee sues for his own benefit, the assignor cares nothing about it, as he cannot be affected by it, and it is a useless form to require the suit to be in

the assignor's name; but in the former it may be always useful, and sometimes essential, that the assignor should retain the control of the suit.

Read the interpretation of the word "assignee" in the third section wherever the word itself occurs in the first section, and it is plain that every assignment to obtain the benefit of the Act must carry the beneficial interest.

It was admitted, and is clear upon the evidence, that the assignment in this case was merely nominal, and that the plaintiff took no beneficial interest under it.

The plaintiff, besides, sues not in his individual character, but as assignee of the insolvent estate, and ostensibly for the benefit of the estate,—while it is evident that the estate has no interest, and that the person really entitled is Mr. Smith. To give a verdict for the plaintiff would be to declare the insolvent's estate entitled to the property, which *ex concessis* it is not.

An amendment might have been made at the trial, by striking out the character in which the plaintiff sues, or by joining or substituting the true owner, but it was not asked for, probably for the reason stated by Mr. Foy, that the Chief Justice was with the plaintiff. It is now asked that the amendment be allowed, the plaintiff being ready to submit to any terms. If amended, as required by the facts, it would be substantially a new suit, and the only terms on which it could be granted would be on payment of the whole costs hitherto incurred. And as the judgment will not prevent a new action being commenced by the proper person, and as it is difficult to determine how far the defendant may have been prejudiced by the course of proceeding at the trial, I do not think it would be a wise exercise of discretion to permit the amendment at this stage.

I think the appeal should be dismissed with costs.

BURTON and PATTERSON, JJ. A., concurred.

*Appeal dismissed.*



## TAYLOR V. TAYLOR ET AL.

Rvr. 2 SCR 616.

*Principal and agent—Trustee and cestui que trust.*

In 1847 the plaintiff, being about to leave Canada, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, George Taylor, one of the above-named defendants. Only a small portion of the purchase money had been paid, the rest having been long in default, and no provision was made by the plaintiff for the payment of the balance. In April, 1851, the brother re-assigned the land to the plaintiff, without any consideration, and without his knowledge, for the purpose either of being enabled to deny his title to the land with a view to a suit brought by one Canniff, who was in possession of the land claiming adversely; or to prevent the bringing of a *qui tam* action for buying a title which was in litigation. The brother paid the residue of the purchase money without the plaintiff's aid or knowledge, and a deed of the land issued in the plaintiff's name. Afterwards, in October, 1851, the plaintiff executed a power of attorney enabling the brother to *sell* the land in question, mentioning it specifically, and a general power to *sell or lease* any lands which he owned in Canada. In 1856 the brother conveyed the property to W. for the alleged consideration of \$1000, and W. immediately re-conveyed one-half of the land to the brother for the alleged consideration of \$200. The plaintiff returned to Canada in 1873, and filed a bill impeaching the transaction between his brother and W., and seeking to have them declared trustees for him. At the hearing the plaintiff and his brother compromised their difficulties.

*Held*, affirming the judgment of the Court of Chancery, HAGARTY, C.J.C.P., dissenting, that the defendant George Taylor was the beneficial owner of the land at the time of the conveyance to W.; and the Court refused to set aside such conveyance.

APPEAL from the judgment of the Court of Chancery, refusing to set aside a conveyance to the defendant Wallbridge, reported in 23 Gr. 496. The pleadings and facts are fully stated there and in the judgments on this appeal.

The appellant's reasons of appeal were:—

1. That the Vice-Chancellor who heard this cause found as a fact, and the evidence establishes, that the lands and premises in the bill of complaint described, were at the time of and previous to the executing of the power of attorney, and of the executing of the conveyances in the third paragraph of the plaintiff's bill mentioned, the property of, and belonged to, the plaintiff.

2. That the conveyance executed by George Taylor (as he pretended for the plaintiff) to the defendant Adam Henry Wallbridge was not a sale, nor was it intended to

operate as a sale, of the lands and premises therein described, nor of any part thereof.

3. That the said deed purported to convey the whole of the said lands to the defendant Wallbridge, whereas it is not contended that he ever was entitled to a conveyance of more than one-half thereof.

4. That the conveyances, dealings, and transactions between the defendants George Taylor and Wallbridge were merely colourable, not *bonâ fide*, and done for the purpose, and with a view, of enabling the said defendants to divide the lands between them, for which improper purpose the said power of attorney was procured or used.

5. That if there ever was any agreement between the defendants Wallbridge and Taylor to procure the lands from the college and contest a law suit, that agreement was corrupt and in fraud of the plaintiff's right, and ought not to be sustained, and any pretended conveyance founded thereon or given in pursuance thereof ought not to be upheld.

6. That there was no *bonâ fide* purchase by the defendant Adam Henry Wallbridge, from the plaintiff, of any portion of the said lands and premises.

7. That the power of attorney did not authorize George Taylor to sell and convey the lands, and that if he had power to sell, he had only power to sell for cash, and the said pretended sale was not for cash: *Greenwood v. Commercial Bank*, 14 Gr. 40; *Brown v. Smart*, 1 E. & A. 148.

8. That George Taylor was the agent and trustee for the plaintiff, which the defendant Adam Henry Wallbridge knew and had full notice of.

9. That said defendant, Adam Henry Wallbridge, had full notice of the position and powers of the defendant George Taylor in reference to the said lands, and that he was not a *bonâ fide* purchaser for value without notice.

10. That the decree pronounced at the hearing was right, for the reasons given by the learned Vice-Chancellor who heard the cause.

The following were the reasons of the defendant Adam Henry Wallbridge against the appeal:—

1. The defendant George Taylor was, at the time of the sale set forth in the memorandum of July, 1853, and the conveyance by him to this defendant in 1856, the equitable and beneficial owner of the whole 100 acres in question, and also the duly constituted attorney of the plaintiff for the sale of any estate, legal or otherwise, which the plaintiff had in the same, and he was competent to sell and convey, and give a valid title to this defendant to the said lands, and by the said sale and conveyance this defendant did acquire a valid title in fee simple to one-half of the said lands.

2. Even if the plaintiff was, at the time of the said sale and conveyance, the owner of the said lands, yet by virtue of his power of attorney in the bill set forth he gave to the defendant George Taylor full power to sell and convey the said 50 acres to this defendant, in fee simple, in the manner in which he did sell and convey the same to the defendant, and the plaintiff is estopped from denying this defendant's title to the said 50 acres.

3. In either case, the said sale and conveyance can only be attacked for fraud or collusion on the part of this defendant and the said George Taylor, and the onus of proof thereof is on the plaintiff, and no fraud or collusion is shewn.

4. No fraudulent intent or purpose on the part of the said George Taylor is proved in the said transaction, and this defendant had no notice of any fraudulent intent on his part, if any there was; and this defendant is a *bonâ fide* purchaser of the said 50 acres for value, without notice of any defect in the title of the said George Taylor to sell and convey to him.

5. The Statute of Limitations is a complete bar to the plaintiff's claim.

6. In any event the laches and acquiescence of the plaintiff disentitle him to any relief as against this defendant, and by analogy to the rule, under 25 Vic. ch. 20, the absence of the plaintiff from the country will not prevail in a Court of Equity, to open up the transaction in

question after so long a time, viz., twenty-one years after it took place.

7. By compromising the suit in the Court below, as against the defendant George Taylor, the plaintiff precluded himself from obtaining any relief as against this defendant, even if his contention as against this defendant in the Court below was correct.

8. The defendant George Taylor could not now impeach the transaction in question, and the plaintiff admitting, as he does, that the said defendant was his agent, cannot be allowed to impeach the same.

9. And on other grounds the decree of the Court below on rehearing is correct, and ought to be affirmed.

The case was argued on the 4th January, 1877 (*a*).

*Bethune*, Q. C., and *G. D. Dickson*, for the appellant.

*Wallbridge*, Q. C., and *Fitzgerald*, Q. C., for the respondent.

The arguments and cases cited appear in the reasons for and against the appeal.

February 20, 1877. HAGARTY, C. J., C. P.—It was conceded by the respondent in the argument, that the Statute of Limitations had no application to the case as a bar or otherwise.

The bill was filed in April, 1874, and no possession was obtained by the defendants, or any one through whom they claimed, till the latter half of 1856.

The case seems to me to turn on one fact, viz., who is the beneficial owner of the land, William or George Taylor.

If it be George's property, there seems to me to be an end of the case, and our decision must be against the appeal. But if the proper conclusion to be drawn from the evidence is, that the land was really the property of the appellant, William, at the time of the dealing between George and the other defendant, I do not see how it is possible to uphold the transaction impeached by the bill.

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(*a*) *Present*.—HARRISON, C. J., HAGARTY, C. J., C. P., BURTON and PATTERSON, JJ. A.



The learned Chancellor, in his judgment, says, "The evidence leads me to believe that the land was William's, though it is unnecessary to decide that it was, but it is not clear to my mind that if so Wallbridge knew it to be so.

The learned Vice Chancellor Blake, says, "It is not clear on the evidence whether as a matter of fact George or William owned this lot."

The learned Vice Chancellor Proudfoot, who at the hearing made a decree in favour of the plaintiff, says, in his judgment, "Further consideration has confirmed my conviction that the land belonged to the plaintiff; that the assignment from George to William, of 30th October, 1851, was for value; that from William to George on the 29th November, 1847, was not for value; and when George re-assigned to William in April, 1851, and got the deed in William's name, he was placing the title where it rightfully belonged. The power of attorney and George's evidence, in *Canniff v. Taylor*, are conclusive to my mind; and I also think that notice to Wallbridge was satisfactorily established."

The evidence given in this suit, apart from that in the suit of *Canniff v. Taylor*, is singularly meagre and unsatisfactory.

I can hardly understand why so little effort seems to have been made on either side to elicit more explicit statements from the principal witnesses. Had the case rested there, I would have felt myself so uncertain as to the main fact, that I would have at once concurred in dismissing the plaintiff's bill as a stale demand, not supported by distinct proof.

When we turn to the case of *Canniff v. Taylor*, we find the evidence of George Taylor, then a man of fresh and clear memory and intelligence, distinct and positive as to the true ownership of the lot. He swore that the land was certainly at one time William's: that the assignment to himself when William was going to California was without consideration, and was not to avoid creditors; and that when he assigned back to William (by Wallbridge's advice)

he supposed it was because he had not paid William for the land; that William had made two or three payments to the College, and that unless William was dead, he, George, had no interest in the suit respecting this land.

I am of opinion that in the absence of clear and distinct proof to the contrary, we ought to assume that in 1856 George Taylor gave a correct account of the true state of the title. I do not so decide on any ground of estoppel, but as the only fair solution of a contested question, otherwise not free from doubt. On the face of the papers the title was certainly in William, and when sold it purported to be sold as William's property.

Mr. Wallbridge states that he made the bargain for the land with George in March, 1851, verbally as I understand at first, before the money was paid to the college.

April 16th, 1851, receipt for £143 7s. 1d. from college to George Taylor in full for the lot, and that deed to William Taylor should be sent, &c.

The deed from George Taylor to William Taylor bears date 12th of April, 1851, and Mr. Wallbridge says it was sent to the college.

It is impossible to understand very distinctly the grounds on which Mr. Wallbridge states he advised this deed to be made. He says it was in view of litigation with Canniff, though he thought there would be no litigation. It was not till May, 1851, that he found out the land could not be got without litigation.

I do not see the exact date at which that the Canniff bill was filed. The answer was put in in November, 1852. The power of attorney from William Taylor was obtained at Mr. Wallbridge's suggestion.

On 7th July, 1853, the agreement for purchase of half the property was made between George Taylor and Mr. Wallbridge. "Received from A. H. Wallbridge the sum of £90 5s. on account of the purchase of half of lot number 8, 2nd concession of Thurlow, which I have agreed to sell to him for £215, said Wallbridge to bear half of the expenses of the suit now going on respecting said

half lot in the Courts of Chancery and Queen's Bench. The remaining \$500 to be paid this fall. If the suit in Chancery does not turn out successfully, then each party to sustain half the loss, and said Walbridge is not to pay \$500."

The decree in the Canniff case dismissing the bill was in June, 1856. In December, 1856, George conveyed under the power of attorney the whole lot to Wallbridge, and on the same day Wallbridge conveyed fifty acres to George himself.

Walbridge says his bargain with George was to pay the college, and indemnify him against all costs of suit that might be brought against him respecting the land.

George swears Wallbridge paid him no money for the half he got. He also seems to deny that he got money from Wallbridge to pay the college. On this latter point I will assume that Wallbridge's statement is correct.

I think, on the whole case, we are bound to identify Wallbridge with all George's acts in the premises, and also with full knowledge of the course taken by George in the Canniff suit in asserting title in William, and with the same knowledge of the title that George possessed.

Then on the assumption, which I feel compelled to make, that the land really belonged to William, it remains to enquire if the conveyance to defendant Wallbridge can be supported. As William's land it was in George's hands to sell for William.

I am not willing, at this distance of time, to raise any question as to the technical sufficiency of the power of attorney to George for the execution of a deed, nor am I prepared to raise any objection to a sale, if made in good faith, of a part of the land to raise money either for making payments to the college to perfect the title, or provide funds absolutely required to defend a hostile claim to the whole.

But I am unable to uphold the transaction by which defendant Wallbridge became the absolute owner of half the property, and the defendant George, the agent and trustee for sale, the absolute owner of the other

half. At the date of the written agreement in July, 1853, the defendant Wallbridge occupied, in my opinion, the position of legal adviser of George. He had been in partnership with Mr. Lewis Wallbridge since February, 1853, and in my judgment a relationship of this character continued down to the execution of the deed in 1856.

Even if this relation did not exist, I do not see how any person with the full knowledge of George's position, and of William's rights, could lawfully acquire a title in this manner.

A trust for sale can rarely be legally executed with a practical result like this, a division of the trust estate between the trustee and his legal adviser, for their absolute benefit.

I am of opinion that the decree of Proudfoot, V. C., was correct, and that this appeal must be allowed.

As I have already stated, my judgment is based on the conclusion of fact that the property belonged to the appellant William.

BURTON, J. A.—I should have arrived at the same conclusion upon the law as that arrived at by the learned Chief Justice in the judgment just delivered, if I agreed with him upon the facts, but I am unable, after a very careful examination of the evidence, to convince myself that the plaintiff had any beneficial interest in the property after the assignment to George Taylor on the 29th of November, 1847.

I think the reasonable inference from the whole evidence is, that the re-assignment to the plaintiff in 1851 was for the purpose of making George Taylor a competent witness in the action against Canniff; but my brother Patterson has so fully and carefully gone through and analyzed the evidence, that I deem it unnecessary to refer to it in detail. I entirely concur in his view of that evidence, and the deductions he has drawn from it, and entertaining that view, I can have no hesitation in confirming the judgment of the Court below, although for different reasons than



those assigned. The evidence, no doubt, is of the most meagre and unsatisfactory nature, which will account for the great differences of opinion existing as to the facts among the learned Judges who have been called upon to adjudicate on this question, but it was the plaintiff's duty to make good his contention beyond all reasonable doubt, and he has failed to do so.

If the payment to the college was made from his moneys, his brother's accounts would have shewn it, and that evidence could have been referred to.

At this late period it was incumbent upon the plaintiff to prove his claim to our satisfaction beyond all reasonable doubt, and not to leave it in the realms of conjecture, especially as he charges the defendants with fraud.

The plaintiff's evidence is neither satisfactory nor consistent. He states in his evidence at the hearing: "I made a transfer of some property to George Taylor when I was going west. I recollect the assignment from myself to George Taylor. I executed this to him as my agent." On his examination on his bill, and on his affidavit on production, he says, I do not recollect ever assigning the contract to George."

All the Judges of the Court below have experienced a difficulty in arriving at a conclusion upon the facts. Sharing their doubts, but feeling that the plaintiff has failed to make out his case satisfactorily, I think the proper course will be, to decline to interfere with the decision of the Court below.

I think therefore that the appeal should be dismissed.

PATTERSON, J. A.—This case turns on questions which are really questions of fact, and the evidence is exceedingly unsatisfactory. From absence of entries in transactions which should have been carefully noted, failure of memory as to material facts on both sides, and conflicting statements by persons who must once have known the truth, it is impossible to arrive at clear and definite conclusions, or to avoid feeling that the best opinion one can form may be far from correct.

In the Court below this difficulty was fully appreciated. The learned Judges, though concurring in dismissing the bill, evidently did not concur in their apprehension of the facts; and on one point on which the learned Chancellor laid some stress, viz., the length of possession, it is clear that his attention was not directed; as particularly as ours has been, to the circumstance that the possession of the land was in Canniff up to the dismissal of his bill in June, 1856, and until he was evicted under a *habere facias possessionem* in the ejectment suit; and that therefore the Statute of Limitations did not stand in the plaintiff's way.

Still, though not barred by the statute, the plaintiff seeks to disturb a possession which had existed for seventeen or eighteen years before this suit. The onus in any case would be on him to establish his right with reasonable freedom from doubt. In this Court he has an additional burden, because the judgment appealed from being already against him, he has to make his case so clear that, whatever might have been our view if trying the case in the first instance, he can now ask us to say that the judgment is wrong.

I shall not attempt to follow the line of argument pursued by any of the learned Judges in the Court below, but shall attempt to point out the aspect in which the case presents itself to my apprehension.

I need not go further back than 1847. There can be no doubt that at that date the right, whatever it was, under the contract with the college, was in the plaintiff, and had been so for several years.

In 1847 the plaintiff contemplated going to California, though he did not actually go until a year or two later.

Three or four instalments of the purchase money had been paid. The other six or seven instalments had all been in arrear for periods varying from five to eleven or twelve years. The contract had no longer any legal validity, and the college was entitled to take possession at any moment, and the actual possession was in Canniff, who claimed adversely to the plaintiff. There is nothing to suggest that

the plaintiff, who was leaving the country, looked upon this land as a property of any value to him, or that he entertained any idea of paying up the college, or making his title better than it was. Under these circumstances he made the transfer to his brother George, and left the country, leaving freehold lands which he apparently expected George to look after, but giving George no conveyance of those lands, nor even any written authority as agent.

Now, I can find nothing to lead me to the belief that the plaintiff made the deed of 1847 with any other idea or intention than to give George absolutely whatever could be made out of such pre-emptive right as the college might recognise under the effete contract, or that he had any idea of making George either agent or trustee in respect of this land. If he was constituting him agent he would naturally have included all his lands. The plaintiff now says he made that deed to George as his agent. George denies this, and I think all the probabilities are in favour of George's account.

The implication of a trust from the voluntary character of the conveyance may be rebutted by evidence that the intention was to confer the beneficial interest. This evidence may be parol evidence: *Cook v. Hutchinson*, 1 Keen 50 *per* Lord Langdale; and may be circumstantial evidence; *Willis v. Willis*, 2 Atk. 71 *per* Lord Hardwicke.

I cannot say I feel any doubt that after the plaintiff made the deed of 1847 he neither had, nor thought he had, any remaining interest in the property.

The right which passed to George, and which in 1850 and the beginning of 1851 belonged to him, was his claim to the consideration of the college as assignee of the contract of 1832. It does not appear that any new contract had been made with the plaintiff.

A letter is in evidence from the plaintiff to the bursar of the college, dated the 28th of November, 1842, stating that he was then able to pay £25, which he would do if he could secure such terms as would enable him ultimately to own the lot, and asking what was the longest time that could be given to him to pay the balance.

We are not told what reply was received, or that the plaintiff paid the £25. I should infer, not only from the plaintiff's silence on the subject, but also from other evidence, that he never did pay it.

The account furnished by the college to George in 1851 shewed £60 unpaid of the original purchase money of £100. The contract recites the payment of £10. In the depositions of George Taylor in the Canniff suit, he states that John Taylor sold the land *about two years* after Jane purchased the land, *i. e.*, after the 3rd of March, 1832, and then (but how long after he does not state) when John refused to give Jane a half-acre lot which he had promised her, and when instead of giving it to her he sold it to E. Murney, Jane *refused to pay the college*, and to carry out John's arrangements with Canniff. If she had duly paid the instalments to the college up to the time of this dispute, which seems to be the proper inference from George's statement, she would apparently have paid three instalments after the first, making £40 in all, and accounting for the balance of £60 without supposing that the plaintiff paid anything.

The actual state of this account could, without doubt, have been shewn by the college books. The plaintiff has not shewn by that means or in any other way that he paid any money on account of the land to the college. The \$50 which he was to pay his brother he says he paid, but George swore in both suits that he never paid it.

There is thus nothing to warrant the conjecture that any new contract was made, and on the whole there seems no doubt that the only right George had in 1850 was such as the old contract gave him, and the enjoyment of that right was clogged by the adverse possession of Canniff, who was in under his purchase from John and the bond of John and Jane, and who was understood to be, as was shewn in the Canniff suit, an applicant for a conveyance from the college.

In this position of the matter George decided to pay up the college, obtain a conveyance, and take proceedings to



eject Canniff; and the evidence is, that at this juncture the connection of the defendant Wallbridge with the matter commenced.

If the land is held to have been George's, we have nothing to do with the transactions between George and Wallbridge; but, pending that inquiry, it may be noted that the proper conclusion, and the only conclusion to which I see my way on the evidence, is, that Wallbridge knew the land only as George's, and dealt with George and advised George on the footing of its being George's.

Under Wallbridge's advice, George, instead of applying in his own name for the deed, transferred the contract to the plaintiff, and paid the money and obtained the college deed in the plaintiff's name.

It has been argued that this was done for an illegal purpose, and that for that reason George must be held to the legal effect of that deed, and that Wallbridge, being privy to that purpose, as undoubtedly he was, is in the same position, and cannot be allowed to shew that the transaction was other than the deeds import. If that is so, Wallbridge is necessarily driven to shew such a dealing with the plaintiff's property as enables him now to hold it against the plaintiff. Before that point is reached, however, the proposition advanced has to be established.

The witnesses who speak of the subject are George Taylor and the defendant Wallbridge. They both shew that litigation with Canniff was contemplated or considered probable, and that the transfer into the plaintiff's name was made in view of that litigation. Taylor says he thinks it was done so that he might be a witness. Wallbridge says he apprehended and wanted to avoid a *qui tam* action against George Taylor for taking a title which was in litigation. Possibly both reasons operated, although neither reason may have been a good one. Canniff was not claiming adversely to the college, from whom the legal estate was to come, but what was treated, perhaps unnecessarily, as the source of danger was the dispute among the Taylor brothers. And the transfer into

William's name would not have rendered George competent as a witness in any action brought or defended in his immediate behalf, under the law of 12 Vic. ch. 70, which was in force in April, 1851, and which, after being superseded by the more liberal rule of 14 & 15 Vic. ch. 66, which became law on 30th August, 1851, was restored by 16 Vic. ch. 19, before the Canniff suit came to a hearing. When the evidence was taken in that suit, George Taylor being tendered as a witness on behalf of the now plaintiff, who was defendant in that suit, was sworn as to his interest in the suit, and said that if his brother was dead he had an interest in the suit, and if the brother was not dead he had no interest.

It may be necessary further on to speak of the effect of these statements as evidence of title either by their simple force, or in conjunction with whatever presumption there may be that Wallbridge, who in April, 1851, had been, as we were informed by Mr. Bethune, two months at the bar, and George Taylor his client, knew and had present to their minds the law of resulting trusts; but we ought not too hastily to adopt the opinion that *actual* fraud either against the law or against any person was intended.

The evidence affords room for the conclusion, which to one familiar with the habits of thought and of dealing at that day, and with the extent to which it would have been reasonable to look for familiarity with the doctrines of equity, will not appear a strained one, that when George procured the deed in the plaintiff's name, he believed that he had put himself entirely in the plaintiff's power; and that although he had paid for the land with his own money and bought it for his own use, he could not enforce any claim against the conveyance, but was wholly dependent upon his brother's consenting to reconvey. We must not forget that interest alone no longer disqualified as a witness; and that whether or not the law which, in August, made even parties to a suit competent witnesses for themselves, had been foreshadowed as early as April, yet one who believed his relation to the land to be what I have just described, and that the recovery in the suit would restore

the land to the nominal plaintiff, who might keep it or convey it as he thought proper, could without any imputation of dishonesty say that the suit was not brought in his immediate or individual behalf, or, as George did actually say in 1856, that he had no interest in the suit.

I note also that the statements of George, that he made the transfers, &c., and that he gave the evidence as to his interest, by the advice of Wallbridge, do not necessarily impute more than that those statements were in accordance with Wallbridge's advice as to the effect of the conveyances.

It is therefore very far from clear that, if we had to decide the point, we could properly conclude that an intention to commit a fraud is proved, or that treating the question in the spirit with which the case of *Childers v. Childers*, 1 DeG. & J. 482, was dealt with by the Lords Justices, we should not feel bound to hold that no such intention is shewn.

Whether George understood that he had put himself in the plaintiff's power or not, I see no reason whatever to doubt that he never intended the land to be his brother's. The purchase money was paid by himself. He either raised it himself or procured it from Wallbridge. Each thinks that he provided the funds, and between them it is impossible to say from which of them the money came; but it seems clear that neither did the plaintiff provide any part of the money, nor does he in any way shew that George paid it by way of a loan to him. The affirmative evidence that George paid it for himself, although he took the deed in the plaintiff's name, is not met by any contradictory evidence.

Then the rule applies which is thus stated by Lord Chief Baron Eyre, in *Dyer v. Dyer*, 2 Cox 93: "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in the name of one or several;

whether jointly or *successively*, results to the man who advances the purchase money; and it goes on a strict analogy to the rule of common law, that when a feoffment is made without consideration, the use results to the feoffor."

Does the purpose and design with which the plaintiff's name was used deprive the defendant of the benefit of this principle? It is unnecessary to cite authorities, of which there is no lack either at common law or in equity, for the proposition that a man making a deed for the purpose of evading an Act of Parliament, or of violating the law, even when not doing an act expressly forbidden by statute, may be held to the strict legal effect of what he does; or to enquire whether this case comes within the principle of those decisions. For our present purpose it is sufficient to quote from Lewin on Trusts, p. 128, a statement which he founds on the authority of Lord Hardwicke in *Cottingham v. Fletcher*, 2 Atk. 156, and on the case of *Muckleston v. Brown*, 6 Ves. 68: "But if the *grantor* himself intended a *fraud* upon the law, the assurance, *if the defendant set up the defence*, will remain absolute against the grantor. But if the defendant admit the trust, it seems the Court will relieve."

I have already indicated that in my opinion the evidence does not make it necessary to hold that any fraud upon the law was *intended*. I have now to notice that the pleadings do not set up the legal objection.

Then is the implication of a trust rebutted by the evidence?

I again quote the rule as stated by Mr. Levin, 6th ed., 150: "As in the cases we have been considering the trust results to the real purchaser by presumption of law, which is merely an *arbitrary implication* in the absence of *reasonable proof* to the contrary, the nominal purchaser is at liberty to rebut the presumption by the production of parol evidence shewing the intention of conferring the beneficial interest."

The evidence relied on is that given by George Taylor himself in the Canniff suit, in which he denied having any



interest in that suit. I have already made some observations upon that evidence. I shall now merely add, as to it, that while the words used are direct evidence to negative any beneficial interest in the land, they are for the purpose of our present inquiry only so much evidence. There is no question of estoppel, and there is nothing to entitle this plaintiff to have more weight given to that evidence than, on a fair consideration of it along with all the other evidence in the case, it deserves. The other evidence shows that the transactions of April, 1851, were effected in the absence and without the knowledge of the plaintiff, but were promptly communicated to him. The power of attorney executed in California in the following October shews this promptness, particularly when we have regard to the facilities for communication in that day, and to the fact stated that some delay occurred owing to uncertainty as to the plaintiff's address. One of the many links in the chain of evidence which is left to be supplied by conjecture is, what was the information sent by George to his brother? He certainly asked him for a power of attorney. The plaintiff says he sent it because George asked for it. But what did George tell him of what had been done and why he had done it? Did he inform him that the right to the land having always been the plaintiff's he had now, unsolicited, advanced the money, paid off the college, and obtained the conveyance to vest the land in the plaintiff?

The power of attorney is scarcely what one would have looked for in that case. The plaintiff had other lands. If the freehold of this had now become his, it would not differ in that respect from his other lands, and the power he gave to George would doubtless have been general and would have applied to all his lands alike. The instrument itself which contains internal evidence of having been prepared abroad, discriminates between this land and the other lands. It specifies this lot particularly and empowers George to *sell it*, while it gives power generally as to all his other lands to *lease or sell them*.

But, on the other hand, if the plaintiff was told what

George and Wallbridge tell us now, that the title had been placed in the plaintiff's name for a particular purpose: that Wallbridge had undertaken to assist George in the contest with Canniff, and to bear a share of the expense: that if the land was recovered Wallbridge was to have half the land for £215, and that the power of attorney was required in order that when the contest was over the necessary conveyances might be made to transfer the legal title from the plaintiff to George and to Wallbridge; and if the plaintiff, assenting to that arrangement, prepared the power of attorney to authorize George to carry it out, he would not unnaturally prepare just such an instrument as the one before us.

I attach no importance to the use of the word *sell* without the word *convey*. The technical force of the expression is not the question. The language may not be apt, but no one can doubt that when George was authorized to *sell* lands the belief of the plaintiff was, that the power given included all that was necessary to pass the title to a purchaser.

It may not be fair to lay much stress on the omission of the plaintiff to ask particularly about this lot when he wrote for statements of his affairs, especially as George never sent him a statement. But the omission is consistent with his claiming no ownership, and it receives some significance from the plaintiff's attempt to account for it by saying that he does not know that he thought George would sell the lot, while the only power he gave him was to sell it.

Then upon the whole evidence, having regard not only to what is proved but to the remarkable absence of evidence on some points which it would have been material to understand—to the fact that the plaintiff is apparently a man of energy and business capacity, and in full possession of his memory and other faculties, while the enfeebled health and failing memory of George may enable the plaintiff to rely on his not being able to supply details which the plaintiff withholds; and that the plaintiff tells us

nothing of what he learned from George when he wrote for the power of attorney, a matter on which the whole controversy might turn—the inference would be far from groundless that the plaintiff was privy to all that George did under cover of the plaintiff's name, in the matter of the Canniff suit; and that, therefore, if entitled to make any use of George's evidence in that suit, as proof of title as between himself and George, we cannot use it as evidence deriving any peculiar force from the occasion on which or the object with which it was given; and it is impossible to say that he has rebutted the presumption of the resulting trust, by showing that it was intended that he should have the beneficial ownership.

I repeat, that in the whole of this case nothing is very satisfactorily shown. But in my view the evidence shews the actual dealing of the parties to have been as I have attempted to indicate much more clearly than any other state of facts; and at all events the plaintiff, who is attacking a transaction long completed and closed, has entirely failed, in my judgment, to show that the land which George dealt with as his, and which Wallbridge considered and dealt with as George's, was not, as to all beneficial interest in it, really George's.

The case was rested before us on the part of the defendant Wallbridge, who is the only respondent before us, almost entirely on the ground that the property was George's; and Mr. Fitzgerald pressed the view which, in my opinion, as above expressed, is the correct one.

In the result, I agree with the conclusion arrived at in the Court below, although I probably reach that conclusion without understanding all the facts as any one of the learned Judges in that Court understood them.

I have merely to add that I do not pursue the subject to the length of forming an independent opinion as to whether, in case the land really belonged to the plaintiff, the transaction with Wallbridge could be upheld. The circumstance that the transaction resulted in the transfer of half the property from the owner to his agent, would undoubtedly

be cogent evidence of its *mala fides*, and might be fatal to it, even though there should be sufficient grounds for believing that there was a sale to Wallbridge of his half for sufficient value, and sufficiently beneficial to the plaintiff to entitle it to stand if it were not implicated with the conveyance to George.

In the view which I take of the evidence of ownership, and starting without any assumption of bad faith, the transaction, if not colourless as a matter of evidence, rather assists the defence.

I think the appeal should be dismissed.

HARRISON, C. J.—I agree that in the disposal of this case it is impossible to separate the defendant Wallbridge from the defendant George Taylor.

I also agree that the appeal must be decided on the answer to the question, whether William or George Taylor was the beneficial owner of the land at the time of the conveyance to the defendant Wallbridge?

The learned Vice Chancellor, who heard the cause and had the advantage of seeing the demeanor of the witnesses, found as a matter of fact that William was the beneficial owner.

If the decision of the case rested on the mere credibility of witnesses I would have great difficulty in coming to a contrary conclusion: *Gray v. Bull*, L. R. 2 Scotch Ap. 53.

But where as here the question mainly depends on the effect to be given to undisputed facts and circumstances, if these be found to point in one direction, the oath of a witness who apparently swears to the contrary ought not to be accepted as conclusive by a Court of Appeal: *The Glannibanta*, L. R. 1 P. D. 283; *Bigsby v. Dickenson*, L. R. 4 Ch. D. 24.

Let it be admitted that in November, 1847, William had the beneficial interest in the land. On the 29th of that month, when about to leave Canada, he, with or without consideration, conveyed his interest to his brother George. It is quite apparent that the interest which William was



then supposed to have was of little or no value, for the whole of the purchase money was payable to the University. William having conveyed his interest to George made no provision for the payment of the purchase money. This he would have done if notwithstanding his transfer it was intended that he should remain the beneficial owner of the land instead of his brother, to whom the conveyance was made, either for value or as a gift. That brother afterwards, without the aid of William and without the knowledge of William, paid the whole of the purchase money to the University. If there had been no previous transfer from George to William there would be no pretence for supposing that the beneficial interest in the land was out of George.

Excluding for a moment the transfer from George to William, and the subsequent oath of George, the conduct of the parties plainly points to the conclusion that George, and not William, was the beneficial owner of the land.

Now, under what circumstances and for what purpose was the transfer from George to William made? It was made without consideration and without previous communication of any kind between George and William. From this it may be inferred that it was made for some *other* purpose than the transfer of the beneficial interest in the land. The purpose, according to the testimony of one witness, was to enable George to be a witness in litigation which was anticipated with Canniff as to the land, for, by the law when the transfer was made, parties to the cause were incompetent witnesses in their own behalf. The purpose, according to the testimony of another witness, was to prevent the bringing of a *qui tam* action against the grantee of land of which another was at the time in possession claiming adversely. It appears to me that the former was the real purpose, but whichever it was, the purpose was other than the real transfer of beneficial interest in the land.

George swears in his answer to the present suit, that he

made the transfer to William under the advice of his solicitor, Mr. Wallbridge, and that he was unable then to say for what reason. Having so made the transfer, he afterwards, in the Canniff suit, by the advice of Mr. Wallbridge, swore that if his brother were still living he had no beneficial interest in the land. In one sense, this was true. By the making of the transfer he had, as he then supposed, placed himself entirely in the power of his brother. Whatever his motive in making this transfer was, he at the time supposed this was the effect of it. And this, in all probability, was the advice, if any, given to him by Mr. Wallbridge. Relying on the faith of that advice, he then swore that if his brother were living, the brother was the beneficial owner of the land; but his oath, given under these circumstances, did not conclusively prove the fact to be so. In the present suit he sets up that throughout the beneficial interest in the land was in himself.

If we can dispose of the case without imputing false swearing to George Taylor, either in 1852 or 1874, it is our duty to do so. The view of the case just presented is one which enables us consistently with the leading facts and circumstances of the case to do so. Besides, it justifies the oath of George Taylor in 1852, otherwise than at the expense of his understanding or his memory in 1874. It is seldom that intelligent men are guilty of false swearing. Such a conclusion ought not to be drawn against any man of good character or position, unless all means of escape from it are impossible.

Besides, as pointed out by my brother Patterson, although the deed from the University issued in the name of William, that was done through the instrumentality of George, who paid the whole purchase money, and so there would be on well understood doctrines in equity a resulting trust in favour of George. The plaintiff has not by the pleadings in any manner properly sought to defeat the inference of this trust by an allegation that George is now seeking to set up his own turpitude to defeat his own deed: *Cottington v. Fletcher*, 2 Atk. 156; *Childers v. Childers*, 1 DeG. & J.

481. And even if he had, I am not, on the present evidence, prepared to hold that what George did in 1851 was an intentional fraud, so as to be an answer to the equity which otherwise arises in his favour: *Haigh v. Kay*, L. R. 7 Ch. Ap. 469.

In either view, I agree in the conclusion that the beneficial ownership of the land at the time of the conveyance to Wallbridge was in George, and not in William Taylor.

While I admit that much may be said, and that much has been said and ably said by the learned Chief Justice of the Common Pleas in favour of the opposite conclusion, and while I entertain very great respect for any opinion of that learned and experienced Judge, I cannot adopt his conclusion of fact in this case.

It is not in the interest of suitors that the decision of any competent Court should be lightly esteemed or rashly reversed by any higher Court. It is the duty of a Court of Appeal, if possible, on any fair ground to sustain the decision of the subordinate Court. It is equally, however, the duty of the higher Court, where it is of opinion beyond reasonable doubt or question that the decision of the lower Court is wrong, to overturn it.

The rule to be followed in such a case is well expressed by Lord Wensleydale, in *Mayor of Beverley v. The Attorney-General*, 6 H. L. Cas. 332-333, where he is reported to have said: "I take it to be perfectly clear that when a Court of Error is considering a former decision on appeal, that decision is not to be overturned, unless the Court of Error is perfectly satisfied that the decision is wrong. *Primâ facie* it is to be considered a right decision, and it is not to be deprived of its effect, unless it is clearly proved to the satisfaction of the Judge that the decision is wrong; but he must consider the whole circumstances together, and if he still feels satisfied, upon the whole case, that the decision is wrong, he ought undoubtedly to overturn it; it is only to be considered as *primâ facie* right. The *onus probandi* lies upon the opposite party to shew that it is

wrong, and if he satisfies the conscience of the Judge that it is wrong, it ought to be reversed."

I agree in thinking that the present appeal should be dismissed.

*Appeal dismissed.*

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MONOHAN V. OKE ET AL., EXECUTORS.

*Maintenance of illegitimate child—Action therefor against executors—  
C. S. U. C., c. 77, sec. 4.*

*Held*, affirming the judgment of the County Court, that an action will lie against the representatives of a deceased father for the maintenance of his illegitimate child during his lifetime, under C. S. U. C., c. 77, sec. 4.

APPEAL from the County Court of the United Counties of Northumberland and Durham.

Declaration: For money payable by the defendants as executors, for food, clothing, lodging, and other necessities furnished by the plaintiff, in the lifetime of the testator, to and for an illegitimate child of the testator while a minor, and not residing with the testator, nor maintained by him as a member of his family.

Demurrer, on the ground that no debt was shewn by defendants as executors to the plaintiff, nor any state of facts from which an indebtedness could be inferred. Judgment on the demurrer was given for the plaintiff.

The defendants appealed.

The appellants' reasons of appeal were:—

1. The plaintiff's declaration does not disclose any cause of action against the personal representatives of the deceased William Silas Oke.

2. There is no right of action against the personal representatives of a deceased father of a bastard child for food, clothing, lodging, or other necessities furnished to or for the bastard: Con. Stat. of U. C. ch. 77 sec. 4; 7 Wm. IV., ch. 8, *preamble* and sec. 4; *Ruttinger v. Temple, Administratrix*, 4 B. & S. 491; *Mortimore v. Wright*, 6 M. & W.



482; *Fluck v. Tollemache*, 1 C. & P. 5; *Cameron v. Baker*, 1 C. & P. 268, *per Best*, C. J.

3. The statutory right to maintain an action against the father is a right of action against the father himself, and cannot be extended to his personal representatives: *Bank of U. C. v. Brough*, 2 E. & A. 95; *Lowell v. Bank of U. C.*, 10 Grant 57; *Beamish v. Pomeroy*, cited in last case.

4. The plaintiff's declaration is improperly framed in *indebitatus assumpsit* upon her alleged cause of action, which is founded upon a statute: *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 826; *Shepherd v. Hills*, 11 Ex. 55; *Wentworth v. Chevill*, 26 L. J. C. 760; B. & L. Prec., 3rd ed. p. 36, and cases there cited.

5. If the *indebitatus* count is applicable, the declaration is bad, because it does not aver any money to be payable *to the plaintiff*, and no indebtedness *to the plaintiff* is averred, neither is any request averred, nor does any contract appear: *Place v. Potts*, 8 Ex. 705; *Wilkinson v. Sharland*, 10 Ex. 724; C. L. P. Act, Schedule B.; *Fenton v. Ellis*, 6 Taunt. 192; *Perks v. Stevens*, 7 East 194; *Kelly v. Curzon*, 4 A. & E. 622; B. & L. Prec., 3rd ed., page 37, citing: *Bardoe v. Spittle*, 1 Ex. 175.

The case was argued on the 8th January, 1877 (a).

*T. M. Benson*, for the appellants. The question for the decision of the Court is, whether an action will lie against the representatives of a deceased father for the maintenance of his bastard child during his lifetime. The English statute 4 & 5 W. IV. ch. 76, sec. 71, is different from ours, as it casts an actual duty on the mother to maintain her illegitimate child; whereas Consol. Stat. U. C. ch. 77, sec. 4, merely gives a right of action against the father for necessaries, &c. It does not create a debt, but is rather in the nature of a penalty. There is no common law liability on the part of parents to maintain their illegitimate children, and the remedy against the father being clearly the creature

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(a) *Present*.—BURTON, PATTERSON, and MOSS, JJ.A., and GALT, J.

of the statute, it cannot be extended to the personal representatives. In *Bank of Upper Canada v. Brough*, 2 E. & A. 95, it was held that the statute allowing the sale of an equity of redemption did not apply to the mortgagor's assignee. It is analogous to actions of negligence, in which the cause of action does not survive. The declaration is bad, as where a right of action is conferred by statute the declaration must be special: *Cork and Bandon R. W. Co. v. Goode*, 13 C. B. 826. Moreover the words "to the plaintiff" are omitted, and no request is averred. He referred to the cases cited in the reasons of appeal.

*F. Osler* for the respondent. The omission of the words "to the plaintiff" is not material, for the declaration sufficiently shews that the action is brought for necessities supplied by the plaintiff, and the defendants could not have been misled thereby: *Fagg v. Nudd*, 3 E. & B. 650; *Hennessy v. Hennessy*, 30 U. C. R. 38. With reference to the form of the declaration, it is well settled that *assumpsit* can be brought on a statute where the plaintiff is entitled to money under its provisions, and it does not direct any particular form of action or remedy: *Comyn's Digest*, Action on Statutes; *Peck v. Wood*, 5 T. R. 130; *Rann v. Green*, Doug. 474. The preamble of 7 Will. IV. ch. 8 shews that it was intended to impose an obligation on the father to support his illegitimate children just as much as the Poor Law, 4 & 5 Will. IV, cast a similar duty on the mother, and it is clear that the right to recover as for a debt accrues to any one furnishing necessities, &c., under C. S. U. C., ch. 77, sec. 4, *Solers v. Lawrence*, Willis's R. 421; *R. v. Falkingham*, 1 C. R. 222. It cannot be contended that the cause of action does not survive. *Ruttinger v. Temple*, 4 B. & S. 491, only decided that an action will not lie against executors for the maintenance of a child after his mother's death, and it was expressly stated that it would have been different if the supplies had been furnished during the mother's lifetime. The Interpretation Act, C. S. U. C., ch. 2 sec. 12, says that "person" shall include the heirs, executors, administrators, and other legal representa-

tives of such person to whom the contract applies ; and an action is maintainable against the executors of a deceased shareholder for calls : *Fyler v. Fyler*, 2 Railway and Canal Cases 813 ; *Heward v. Wheatly*, DeG. M. & G. 628 ; *Wills v. Murray*, 4 Ex. 843 ; *Blount v. Hipkins*, 7 Sim. 51.

February 20, 1877. PATTERSON, J. A.—Some objections to the form of the action were urged, but were not much insisted on. They could not be sustained. The declaration is quite sufficient to shew that the plaintiff is advancing a claim which would have been a good claim under the statute C. S. U. C. c. 77, sec. 4, against the testator in his lifetime. The only question, is whether it comes within the rule *actio personalis moritur cum personâ*. It was urged by Mr. Benson, in his able argument for the demurrer, that the statute does not create a debt, but only gives a right of action, the words being that the person who furnishes food, &c., “may maintain an action for the value thereof against the father of the child” ; and that, as in the case of a penal action, the debt is only created by the effect of the action, either by the recovery of judgment, or at all events not unless the action is brought ; and that therefore no debt existed to which the executors became liable, and that no right of action against them is given. This argument is ingenious and not without force, and it is the only view of the statute on which a contest could be plausibly based. It cannot, however, prevail. The plain effect of the statute is to throw upon the father the duty of maintaining the child, provided the proper affidavit of affiliation has been filed within the prescribed time. He must either maintain it himself as a member of his family or pay those who do maintain it. An action accrues to the person who maintains the child. The contention is, that this action does not survive because no contract exists and no debt is created. I am inclined to the opinion that a debt is created ; but conceding, for argument’s sake, that no debt, *eo nomine*, results from furnishing necessaries, the rule is not shewn to apply, because the existence or absence of a contract or debt is not a decisive test.

The application of the rule is illustrated at considerable length in *Williams on Executors*, at pp. 1596, *et seq.* of the 6th Ed. I quote the following more concise statement from 1 Wms. Saund. 239.

“It was a principle of the common law that if an injury were done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person *to* whom or *by* whom the wrong was done; and from a misconception or misapplication of this principle it was formerly doubted whether *assumpsit* would lie either for or against an executor; because the action, it was said, was in form *trespass* upon the case, and therefore supposed a *wrong*, and in substance to recover *damages* only *in satisfaction* of the wrong. But where the cause of action was founded upon any *malfeasance* or *misfeasance*, or was a *tort*, or arose *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other cases of the like kind, when *the declaration* imputes a tort done either to the person or property of another, and *the plea* must be not guilty, the rule was, *actio personalis moritur cum personâ*; and this rule still holds with respect to the person *by whom* the injury is committed; for if he dies, no action of this kind can be brought *against* his executor or administrator, though in some of these cases, such as taking away goods, &c., a remedy may be had *against* the executor in another form. But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any *other duty* to be performed; for there the action survived.”

The right of action in the present case accrued during the lifetime of the testator, and survived against the defendants as his executors.

The appeal must be dismissed with costs.

MOSS, J. A.—THE determination of this appeal depends upon the application of principles in themselves well settled. It is well settled that an action will not lie



against an executor upon a penal statute ; but the kind of statute meant in this rule is one by which a common informer or party aggrieved can recover a penalty from a person who violates its provisions. The fallacy of the defendants' argument in this case consists in treating the statute in question as a penal statute in any such sense. Its object, as shown both by the recital and the language of the enactment, was to impose upon the father of an illegitimate child the *obligation* to support him during minority. If the child resided with him and was maintained by him, the obligation was discharged. If not, the law imposed upon him the obligation of paying to the person who might supply food, clothing, lodging, or other necessities, their value. This is not the right to recover a penalty given to a person aggrieved, or to a common informer. As I read the statute, it gives to any person the right to supply what the father ought to have supplied, and to sue him for reimbursement. I think it is clear that upon such a statute an action of *assumpsit* could have been maintained.

In *Peck v. Wood*, 5 T. R. 130, an action of *assumpsit* was successfully brought to recover half the expenses of a party wall between the plaintiff's and defendant's house, under the provision of a statute which enacted that the person at whose expense any party wall should be built agreeably to its directions, should be *reimbursed* one-half of the expense by the owner of the improved rent of the adjoining building or ground. I cannot perceive any substantial distinction between the rights given by that statute, and by the statute upon which this action is founded.

So *Rann v. Green*, Cowp. 476, was an action of *assumpsit*, to recover from the defendant a sum of money pursuant to an order made under the authority of a private Act of Parliament concerning tithes. It is true that the plaintiff was nonsuited, but by no means because his form of action was not properly conceived. On the contrary, Lord Mansfield expressly recognized the correctness of the procedure in that respect, stating that the statute was the ground of action, and that when that was done which the

statute authorized, the law raised an *assumpsit*. The ground of nonsuit was, that there was a fatal variance in the declaration, by describing the statute as of the 4th of Philip and Mary, whereas the record when produced appeared to be the 4th and 5th of Philip and Mary. In Comyn's Digest the rule is expressly enunciated.

In *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 826, there was much discussion upon this point, as affecting the question whether the period of limitation for bringing an action for calls under the Companies Clauses Consolidation Act was 20 years or 6 years. It was held that the particular action in question was *debt* upon a statutory liability, and that the proper limitation was therefore the longer period. But this is not an authority in favour of the present defendants. It is true that an action of *debt*, technically so called, could not in certain cases be maintained against an executor, but that applied only to debt upon simple contract, and in cases where the testator might have waged his law. Wager of law was abolished in the same session of Parliament in which the statute now in question was passed. Moreover, whatever was the appropriate form of action against the shareholder, while alive, it is quite settled that his estate was liable in the hands of his executors for calls. Then in the days when forms of action were of practical importance, the test that would have been applied to this case is, whether *assumpsit* would lie. If the answer would have been, as I have shown it must have been, in the affirmative, the maxim *actio personalis moritur cum personâ* could not have been invoked. To prove this it is only necessary to refer to the judgment of the Court in *Hambly v. Trott*, Cowp. 375, which was delivered by Lord Mansfield after a careful examination of the authorities. It was an action of trover against an administrator with the will annexed, for a conversion by the testator in his lifetime. The plea was not guilty. The judgment explains that the cases are divisible into two classes, the first being those where the action survives or dies on account of the *cause* of action; and the second where the action survives or dies on account of the *form* of action.

Among those in which the action survives on the first account are placed those in which the cause of action is a promise express or implied. On account of the *form* it was held that an action would not lie where the declaration must be *quare vi et armis et contra pacem*, or where the plea must be not guilty. The following passage from the judgment illustrates these rules:—"But in most, if not in all the cases where trover lies against the testator, another action might be brought against the executor which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime; the plea is not guilty; therefore it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie." The meaning plainly is, that as the testator might have been sued in *assumpsit* on the implied promise, the action survives against the executor. It seems to me that these considerations are sufficient to dispose of the appeal.

There were other minor points suggested, but the very satisfactory judgment of the learned Judge of the County Court convincingly shows that they do not assist the defendants.

BURTON, J.A., and GALT, J., concurred.

*Appeal dismissed.*

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## MCARTHUR V. SMITH ET AL.

*Premium notes—Mutual Ins. Co.*

*Held*, reversing the judgment of the County Court, that a promissory note made in 1871, payable to the order of a Mutual Insurance Company, or its officers, in respect of a policy, was negotiable.  
*Gore District Mutual Ins. Co. v. Simons*, 13 U. C. R. 556, commented upon.

APPEAL from the County Court of the county of Victoria.

The first count of the declaration charged that the defendants, on the 4th of May, 1871, made their promissory note for \$480, payable on demand, to the order of H. M. Giles, secretary-treasurer of the Niagara District Mutual Fire Insurance Company, which Giles endorsed to plaintiff.

The second count was the common count for money paid to defendant's use, and on accounts stated.

The defendant McArthur suffered judgment by default.

The defendant Smith pleaded five pleas to the first count, viz :—

1. That the defendants did not make the note as alleged.
2. That Giles did not endorse the note to the plaintiff as alleged.
3. That the plaintiff was not, at the commencement of the suit, the lawful holder of the note.
4. That the note was paid after it was due to Giles, and endorsed to the plaintiff after payment.
5. That the note was a premium note given on an insurance under the statutes respecting mutual insurance companies : that the defendants paid all assessments properly and legally made upon them, and at the expiration of their insurance they were entitled to demand and receive the note ; and that the plaintiff took the note with full knowledge of these matters.

To the second count there were pleas of never indebted, and payment before action.

It appeared that the defendants, by the name of Smith & McArthur, made the note, which was in these words :—



" ST. CATHARINES, May 4, 1871.

" \$480.

" On demand, we promise to pay H. M. Giles, secretary-treasurer of the Niagara District Mutual Fire Insurance Company, or order, at their office in St. Catharines, the sum of four hundred and eighty dollars for value received.

" SMITH & McARTHUR."

The note was endorsed by Giles and by the plaintiff.

This note was given in respect of a policy for three years for \$2,000 upon property which was destroyed by fire about the end of the first year. The company claimed the right, which was not disputed, to retain in their hands out of the insurance money the amount unpaid on the note, to meet future assessments; but consented to pay over the money if the defendants procured an endorser. The defendants then requested the plaintiff to endorse the note, and he did so. Further assessments were made on the defendants, and when the term of their insurance expired, the amount payable by them was \$372.

The plaintiff had a policy of his own in the same company; and, a loss having happened, the company retained from him the \$372 and handed him the note. The defendant Smith afterwards told the plaintiff that he had not the money then, but that he would allow him interest.

The case was tried by the learned Judge of the County Court without a jury. A verdict was entered for the defendant, and a rule for a new trial or to enter a verdict for the plaintiff was, after argument, discharged.

The verdict and judgment proceeded upon the ground that the insurance company could not transfer the note, and therefore the plaintiff could not recover on the first count: that the plaintiff could not have been compelled to pay the \$372 to the company; and that under the doctrine acted upon in *Sleigh v. Sleigh*, 5 Exch. 514, the payment was a voluntary payment, and not one which would support the count for money paid at the defendants' request.

The plaintiff appealed.

The appellant's reasons of appeal were,

1. The payment by the plaintiff of the note to the Niagara District Insurance Company was not a voluntary payment, as he was obliged to let the company retain the amount due on the note, in order to get his own money from them, and not being a voluntary payment the plaintiff is entitled to recover: *Lamb v. Wilson*, 38 Q. B. U. C. 14; *Rivers v. Roe*, 4 C. P. 21; *Moses v. McFarlane*, 2 Burr. 1012; *Brittain v. Lloyd*, 14 M. & W. 762; *Alexander v. Vane*, 1 M. & W. 511; *Tappin v. Broster*, 1 C. & P. 112; *Spencer v. Parry*, 3 A. & E., 331.

2. The plaintiff was not a stranger in the matter, and the relation between the plaintiff and the defendants being that of surety and debtor, there was an implied request by the defendants to the plaintiff to pay the debt if they did not; and the plaintiff having paid it on the default of the defendants to do so, the plaintiff is entitled to recover under the count for money paid: *Alexander v. Vane*, 1 M. & W. 511.

3. The rule against voluntary payments arose from the principle that a man was not entitled to make himself the creditor of another without the latter's consent; and this principle being abolished by Stat. 35 Vic., ch. 12, O., which allows the assignment by a creditor to any one of all choses in action, without the concurrence of the debtor in any way, the reason for the rule against voluntary payments ceased, and the rule should also; and the plaintiff having paid a debt which the defendants were compellable to pay, the liability of the defendants for the debt was thereby extinguished: *Harrison v. Hicks*, 1 Porter, 423; and the defendants having obtained the benefit of the payment by the plaintiff, and having actually promised to repay the plaintiff, the plaintiff is entitled to recover under the count for money paid: *Tappin v. Broster*, 1 C. & P. 112.

The case was argued on the 8th January, 1877. (a).

*Kerr*, Q.C., for the appellant. The plaintiff is entitled to recover on the first count, as the note in question is a promissory note for the amount for which the defendants were liable to the company at the time it was given, and the payment by the plaintiff was made in discharge of his liability as endorser. The learned Judge in the Court below held that he could not recover on the common counts, on the ground that no previous request was proved, but the defendants' request to endorse was a sufficient request to pay the note if he failed to do so: *Alexander v. Vane*, 1 M. & W. 511. Besides, the defendants promised to re-pay the plaintiff and allow him interest, which is evidence of a previous request: 1 *Wm. Saunders*, 264. The payment cannot be considered a voluntary payment, as the company insisted on retaining the amount due on the note before paying him his insurance: *Rivers v. Roe*, 4 C. P. 21; *Moses v. McFarlane*, 2 Burr. 1012; *Brittain v. Lloyd*, 14 M. & W. 762; *Tappin v. Broster*, 1 C. & P. 115. The case of *Wallbridge v. Brown*, 18 U. C. R. 158, shews that the claim was not beyond the jurisdiction of the County Court.

*Osler* for the respondents. It is quite clear that the plaintiff cannot recover on the note, as *The Gore District Mutual Ins. Co. v. Simons*, 13 U. C. R. 556, expressly decides that such a note is not a negotiable security. The County Court had no jurisdiction to hear the case, as the amount was not liquidated or ascertained by the signature of the parties; and under the circumstances this Court cannot entertain the appeal. The evidence shews that the payment was voluntary, as the company did not compel the plaintiff to pay the note; they merely refused to give him his insurance without first retaining the amount due: *Sleigh v. Sleigh*, 5 Ex. 514; *Johnson v. Royal Mail Packet Co.*, L. R. 3 C. P. 45. \*This case is distinguishable from *Alexander v. Vane*, 1 M. & W. 511, as the plaintiff was under no legal objection to pay, and a request cannot therefore be implied. The promise to pay was too indefinite to imply a previous request: 1 W. S. 351-6, 6th ed, 1871; *Lampleigh v. Braithwait*, 2 Smith L. C. 141, 147, 148, 7th ed.; *Chitty on Contracts*, 10th ed., 548.

February 20, 1877. PATTERSON, J.A.—The learned Judge decided at the trial against the plaintiff's right to recover on the first count, on the authority of *The Gore District Mutual Ins. Co. v. Simons*, 13 U. C. R. 555.

That count does not seem to have been insisted on before him in term, and the decision with reference to it is not now directly impugned by the written grounds of appeal. The same questions are, however, involved in the plaintiff's liability as endorser, which appears to have been discussed chiefly as a test of his right to recover under the count for money paid to the defendants' use.

I think it is plain that the plaintiff is entitled to recover on the note.

It is not on its face a note payable to the company, nor even payable to Giles as an officer of the company, the words secretary-treasurer, &c., being words of description only. I note this as a fact, although in my opinion the law would apply in exactly the same way if the note had been payable to the order of the company, or to the order of Giles as secretary.

In its form the note is an ordinary negotiable promissory note. If it has the form without the ordinary properties of such a note, we have a result so anomalous in its character as to require for its support a very plain legislative declaration.

The only reported decision under our statutes touching the question is in the case which in the Court below was supposed to govern this one, viz., *The Gore District Mutual Ins. Co. v. Simons*, 13 U. C. R. 555. That case has the appearance of a strong authority, but an examination of it shews that it is only at first sight it has that appearance.

The note there in question was made payable to the order of the company, and was endorsed by the secretary of the company, and, after him, by the defendant. It was held that the defendant was not liable upon it as endorser.

After considering the statutes, Sir J. B. Robinson, C.J., sums up his opinion thus: "Looking at this note as one given since the statute 16 Vic. ch. 192, and for the



purpose of an insurance under 6 Wm. IV. ch. 18, amended by the subsequent acts, we cannot, in our opinion, consider that the endorsement made by the secretary of the company constituted a valid endorsement of this note, transferring it to this defendant with the ordinary consequences attending such an endorsement; nor can we look upon the endorsement of the defendant as transferring the note to the company, and as giving them a right to charge him with the ordinary liability of an endorser. As this case stands upon the declaration, the plaintiffs could not, in our opinion, recover. They have treated this as an ordinary note, endorsed to the defendant and by him endorsed again, and upon which he is liable as endorser; whereas it is plain it was not endorsed to him and could not be so as to give him the ordinary rights of an endorser, or throw upon him the ordinary liabilities of an endorser, for it would have been a violation of the statute for the company to have transferred it to any one. They were bound to retain it in deposit to be dealt with as the statute directs."

The learned Chief Justice further points out that, if charged as endorser, the defendant must succeed on his pleas denying presentment and notice. The plaintiffs therefore failed in that case, irrespective of difficulties created by the statutes. The statute 6 Wm. IV. ch. 18, sec. 12, directed that the insured before receiving his policy should deposit his promissory note payable to the company for such sum of money as should be determined by the board of directors; a part of which note, *not exceeding five per cent.*, should be immediately paid to the treasurer for the purpose of discharging incidental expenses, and the remainder, in part or in whole, at any time the board should deem requisite for the payment of losses or expenses, and at the expiration of the term of insurance, the note or such part thereof as should remain unpaid after deducting all losses and expenses occurring during the term, should be relinquished and given up to the maker thereof.

Then came 4-5 Vic. ch. 64, which enacted that nothing in sec. 12 of the former Act should be construed to prevent

the note from being made payable to any officer of the company, or to any other person or persons for the purpose of being endorsed by such person or persons in favour of or to the company or such officer.

16 Vic. ch. 192, sec. 2, repealed sec. 12 of 6 Wm. IV. ch. 18, and sec. 3 re-enacted it word for word, except that for the words I have italicised, the words "to be determined by the board of directors" were substituted.

That was the state of the law when the note was made which came in question in the case cited.

The Court, in that case, treated the Act of 4 & 5 Vic. as superseded, and the law as restored to its original state by 16 Vic. ch. 192. The learned Chief Justice did, it is true, intimate that it might not have made any difference in that case, even if the Act 4 & 5 Vic. had remained in force, but that dictum appears to have been a passing remark rather than a distinct opinion, as nothing was said to indicate how he considered that under that Statute the endorsement by the payee could create any liability or even transfer the note to the company unless the note possessed the qualities and incidents which are now disputed. It is noticeable also that while holding that neither of the Acts, 6 Wm. IV. or 16 Vic., contemplated the transfer of the notes by the company, a construction of those Acts in which I fully concur, nothing was said of the circumstance that the Acts did not contemplate the making of notes in negotiable form; and that therefore the question presented by the facts was the effect of entering into an obligation not forbidden by law, but of a character not directed or contemplated. If the law required only a note payable to the company, but the insured chose to make one payable to the company's order, on what principle could he say he had not made a negotiable note? And if under the Act of 4 & 5 Vic. a person endorsed the note as surety for the maker, and, in discharge of his contract as endorser, had to pay the note to the company, on what principle was he to be deprived of his recourse on the note to the prior parties? These questions are not touched in the judg-

ment. It need scarcely be remarked that they are very different from the question of the right of the company, as against the maker of the note, to transfer it—or their duty to retain it in their own possession and control. This latter question is that with which the judgment is really occupied. It is pointed out that the form of that note carried with it notice that it was a note given under the statute, and that no one could take it without being affected with such notice, an argument that concedes the negotiability of the note; and the case was decided on the grounds, equally intelligible and well founded, that the company, who were payees, had not endorsed the note; that it being a violation of the statutory duty of the company to have parted with the note, it would not be presumed that the secretary had been authorized to endorse it for the company; and that even if endorsed by the company to the defendant and by him re-endorsed to the company, he was discharged by want of notice of dishonour.

In consolidating the Statutes in 1859, a different view was taken from that which had been expressed by the Court of Queen's Bench, of the effect of 16 Vic. ch. 192; for the Act of 4 & 5 Vic. was treated as still in force, and was embodied along with the 3rd section of 16 Vic. ch. 192, in section 21 of C. S. U. C. ch. 52.

Section 76 of the Cons. Stat. contains a provision which existed in the original Act—that after thirty days default in paying any assessment, the company may sue for and collect the whole amount of the note, holding the money thereafter in place of the note.

This preserved the idea of the instrument as properly a promissory note, and maintained the ordinary legal relations of maker, endorser, endorsee, or holder, without disturbance.

It was not till 1861 that any provision was made for collecting by action any part of the note without collecting the whole.

The Act of that year, 24 Vic. ch. 47, enabled the company, in place of suing for the whole amount of the note, to sue

in a Division Court for any amount not exceeding \$100, assessed against any insurer, for his proportion of loss or damage. But even that Act does not seem intended to give the note the effect of a note payable by instalments, as it does not authorize a suit *on the note*, but only a suit for the amount assessed against the person insured. If an endorser had to be resorted to for payment of an assessment, even under \$100. it was still apparently necessary to sue on the note, and competent to sue only once on the note.

The scope and object of local Mutual Insurance Companies incorporated under our Statutes, has been from time to time enlarged and altered so essentially, that for many years the distinction between their operations and that of ordinary stock companies has not been very obvious.

An Act passed in 1859, 22 Vic. ch. 46, authorized amongst other changes the formation of a guarantee capital, the division of profits, investment of funds, extension of operations to any part of Lower Canada and Upper Canada, and insurances for cash premiums.

I am not certain that an express power to take *notes* for *cash premiums* was given by the statutes; but in 1865 such notes were recognized by the statute 29 Vic. ch. 37, sec. 4 of which gave power to bring in the Division Court for the division wherein the head office of the company is situate, any suit cognizable in a Division Court upon or for any premium or deposit note, or any sum assessed or to be assessed thereon, or upon or for any note given to the company or to any officer or agent thereof for cash premiums of insurance: and sec. 5 declared that in case any note given or to be given for a cash premium of insurance to the company, or to any officer or agent thereof, or any sum assessed upon a premium or deposit note given or to be given to the company, or to any agent or officer thereof, should remain in arrear and unpaid for thirty days, the policy should be void.

The Act of 1868, 31 Vic. ch. 32, made further provisions, not material to our present purpose, concerning the extended constitution of these companies.



The contention now is in effect that the note must be read as if the statutory restrictions were expressed on its face. If that were so, the instrument would cease to be a promissory note, because the amount would be rendered uncertain. This was not the understanding of the law which led to the passing of the Dominion Statute 34 Vic. ch. 12, which provided for making valid by the payment of double stamp duty promissory notes and bills of exchange made and given for premiums of insurance by any member of a mutual fire insurance company to any such company, or to some officer thereof.

When the note now in question was given in May, 1871, and when it was endorsed by the plaintiff, some time in 1872, the law, as existing under these statutes, authorized the taking of notes either for premiums on policies on the mutual system, or for cash premiums, by the company, or by any officer of the company, or by any agent of the company, and the making of a note to any other person, for the purpose of that person endorsing the note in favour of or to the company or its officer.

I can see no reason to hold the intention of the statutes to be that these notes shall not be in form negotiable notes. I think that intention might not unfairly have been imputed to the original statute of 6 Wm. IV., and it may, perhaps, be arguable whether there is not a return to that intention in the Act of 1873, 36 Vic. ch. 44, sec. 41. It seems to my apprehension very clear that the idea with which the enactments were framed which provided for the endorsement of notes by way of security to the company, and for notes being made to agents taking risks anywhere throughout Upper and Lower Canada, and for the same being sued by the company in the same division where its head office was situate, was the idea of a negotiable note. But whether that idea can be affirmatively shewn in the statutes or not, we may look in vain for anything indicating a prohibition of taking such instruments; and therefore a person making a negotiable note to the company, or its officer, has no ground for maintaining that the note has

not all the incidents of a negotiable note. He has, of course, a perfect right to insist against the company, that the note shall only be dealt with for the purposes and in the manner intended by the statute, and any one taking it with notice can acquire no right which the company did not possess.

In the present case no claim is asserted which the defendants have any right to object to. The defence is of a technical character and is advanced to defeat the true contract between the parties. The defendants were liable to pay the \$372 in question. The plaintiff, who became surety for them at their request, has had to discharge their debt, and that amount is all he now demands. He does not claim any right which the company might not assert.

The appeal should be allowed with costs, and the rule in the Court below made absolute to enter a verdict for the plaintiff for \$372, with interest from the date at which the plaintiff paid or settled for the money, or for \$400 if the whole amount would exceed that sum.

BURTON, J. A.—I concur in the judgment delivered by my brother Patterson, although I must admit that upon the argument I was under the impression, entertained apparently by all parties in the Court below, that the note declared on was not a negotiable instrument. That opinion has been accepted by the profession for such a long series of years as to have become almost settled law, coming within the definition of what some English Judge has described “as law taken for granted.” And this is not surprising when one remembers that it originated with a learned Judge whose opinions are always received here with the utmost respect, and are universally admitted to be entitled to great weight; but it was a mere dictum which the circumstances of the case did not call for, and which was not material to its decision.

I should not have thought it necessary to add anything to the remarks of my learned brother, but I was counsel in that case for the defendant and, desire to point out that,

besides relying on the defence that the company, who were the payees, had not endorsed the note in fact, and that the defendant had received no notice of non-payment, the point was raised on another plea that the company were not entitled to sue as plaintiffs, inasmuch as they were the payees and first endorsers.

The two first issues were found in favour of the defendant, and the other plea was a *primâ facie* answer to the claim, which was not displaced by the replication. It was not material, therefore, to the decision of that case to consider the effect of the document, as, conceding it to be an ordinary negotiable promissory note, the plaintiffs were not entitled to recover.

It is clear, I think, that the notes which the Acts regulating Mutual Insurance Companies originally contemplated, were notes payable to the company at such times and in such instalments as the assessments might be made; and so drawn they would not be promissory notes, but would be more correctly described as in the recent Acts as premium notes or undertakings; but the amendments to the Acts seem to have recognized the acceptance by the company of negotiable promissory notes, and there is nothing in any of the Acts to prohibit such notes.

I agree, therefore, that there is no obstacle to the plaintiff recovering upon this note, which, it is not denied was duly endorsed to him, to the extent of the assessments properly made and paid by him; and I think the appeal should be allowed.

MOSS, J. A., and GALT, J., concurred.

*Appeal allowed.*

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IN THE MATTER OF THE NIAGARA HIGH SCHOOL BOARD  
AND THE CORPORATION OF THE TOWNSHIP OF NIAGARA.

*High Schools—37 Vic. ch. 27, O.*

*Held*, affirming the judgment of the Queen's Bench, that under 37 Vic., c. 27, O., the High School Board for a district composed of two municipalities, a town and a township, can compel one of the municipalities, the township, to contribute towards the erection of a school-house in the other municipality, and not merely towards its maintenance.

THIS was an appeal from a decision of the Court of Queen's Bench, reported 39 U. C. R. 362, affirming an order of Mr. Justice Wilson, directing a writ of *mandamus* to issue to the corporation of the township of Niagara, commanding them to raise their proportion of a sum required by the Board of the High School District, composed of the town and township of Niagara, in pursuance of the powers conferred upon them by the Consolidated High School Act of 1874, for the purpose of defraying the cost of erecting a new high school building, in the town of Niagara.

The appellants' reasons of appeal were as follows:—

1st. The judgment of the Court is erroneous in deciding that the corporation of the township of Niagara is liable to contribute to the building of a school house for a high school situate in the town of Niagara.

2nd. In deciding that the term "maintenance of a high school" includes or is equivalent to "accommodation," whereas maintenance merely applies to the sustaining or keeping up of the school established, while accommodation means place or building for a school.

That previous to the passing of the Act 37 Vic. ch. 27, O., there was no compulsory obligation on a township or municipality to support or aid in any way a high school. The cities, towns, and villages, in which the school house was situated, sustained the burden of such school voluntarily with the aid of the county council, fees paid by pupils, voluntary individual contributions, and the Government or statutory aid. And the above Act was passed to render compulsory, in the municipality in which the school



house is situate, the burden voluntarily assumed thereby, and to the extent of assisting in maintaining a school established; also, upon any municipality brought into a high school district by by-law of the county council; but as places remote from the school house do not receive the same benefit from the school as the municipality in which the school house is situated, the burden of providing the school house was placed upon the last mentioned municipality, as also the obligation to assist in the maintenance or keeping up of the school, and that of assisting in maintaining was alone made compulsory in the other municipalities of the school district.

The respondent's reasons against the appeal were:—

1. The corporation of the township of Niagara is, under and by virtue of the Acts consolidating and amending the law as to collegiate institutes and high schools, bound to contribute towards the expenses of providing accommodation for the school.

2. Sections 44 and 45 of Cap. 27, 37 Vic., O., being the Act above referred to, should be read together to see the intention of the Legislature, and when so read it is clear that the intention in all cases was to provide proper accommodation and support for schools and the ways and means therefor, and the word "maintenance" in the latter part of section 45 should be read as if the words "support and accommodation" were added, and the said word "maintenance" should be construed as meaning support and accommodation.

The case was argued on the 20th January, 1877 (a).

*M. C. Cameron*, Q.C., for the appellants. The township of Niagara cannot be compelled to share the liability incurred in the erection of a school house in the town, as 37 Vic. ch. 27, sec. 45, expressly provides that the town or township in which the school is situated shall provide accommodation, while they are both equally liable for its maintenance.

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(a) *Present*.—HAGARTY, C.J., C.P., BURTON, PATTERSON, and MOSS, JJ.A.

This is a reasonable construction of the statute, as the municipality where the school is receives the greatest benefit from it. Where taxation is imposed by a statute, nothing is construed in favour of the taxation. He referred to *Everett v. Morgan*, 2 M. & G. 277; *Shaw v. Ruddin*, 9 Ir. C. L. 214; *The Queen v. Guardians of Mallow*, 12 Ir. C. L. 40; *Hodgins's Public School Law*, 18, 160.

*J. A. Miller*, Q. C., for the respondent. The Legislature never intended that the whole expense of providing accommodation should be borne by the municipality in which the school is, and that the other municipality should participate equally in its advantages by merely contributing towards its maintenance. The word "maintenance" in the latter part of sec. 45, 37 Vic. ch. 27 O., should be read as "accommodation and support." The dictionary says, it includes "all conveniences," and the meaning of the word should not be narrowed by the Court.

BURTON, J. A. The town and township of Niagara had, for sometime before the passing of the Consolidated High School Act, been formed into a high school district under a by-law of the county council.

Previously to the passing of the Act of 1874, 34 Vict. c. 33 O., there was no compulsory obligation upon a township or municipality to support or aid in any way a high school. The cities, towns, or villages in which they were erected, sustained the burden voluntarily, with such aid as the county council might choose to give, in addition to the Government grant; and it was contended by the learned counsel for the appellants, that when the Legislature for the first time made it compulsory on municipalities to raise money for this purpose, and at the same time enabled the county council to unite a township or part of a township with a town as a high school district, they deliberately used language intended to draw a distinction between the obligation of the town within which the high school was situated and that of the townships, the advantages conferred upon

which would be less than those enjoyed by the other, and that the then existing state of the law must be borne in mind in construing the more recent enactments, and that thus viewed it was manifest that the Legislature intended to impose upon the municipality within which the school was situated the duty of providing the accommodation, whilst that of the other municipality or municipalities was restricted to the maintenance. Whatever may have been the intention of the Legislature, they have certainly not used language calculated to convey any such clear indication of their meaning as is contended. On the contrary, when legislating in reference to cities and towns, the terms "accommodation and support" only are used, no reference being made to maintenance; when applied to towns not separated from the county, or villages or townships, the terms are "maintenance and accommodation," no reference being made to "support;" whilst in the case of the whole county, or a part of it, being formed into a school district the word "maintenance" alone is used, without reference either to "accommodation or support." Whilst again, in sec. 61 sub-sec. 6, the trustees of the high school are required to apply to the municipal councils of the city or town, (separated for municipal purposes) as the case may be, for such sums as they require for the support, management, and school accommodation, and other necessary expenses of the high school. In sub-sec. A of that section it is provided that the board of a high school district, as in the present case, shall apply to the council or councils of the respective municipalities out of which the high school district is formed, for such sums as are authorized by the 45th sec.

It is clear, then, I think, that the Legislature have not drawn in express terms any such distinction as is contended for, and I think it is manifest from the whole scope of the enactment that it was not intended to do so.

The 42nd section makes every city and every town separated for municipal purposes, and the high school districts of every town so separated for all high school purposes, a separate county.

The next section provides that such town may, by arrangement with the county council, unite the whole or a part of an adjoining township with such town, so as to form a high school district, upon such terms as may be mutually concurred in, but when formed the district becomes for all high school purposes a separate county, within the jurisdiction of the town council and the high school board.

In the case, however, of a town not separated for municipal purposes, or in the case of an incorporated village, or a township, establishing a high school, the county is bound to pay a sum equivalent to one-half the Government grant, and the council of the municipality in which the school is situate are compelled to raise such other sums as may be required for maintenance and school accommodation—in other words, all such sums as may be necessary for erecting or providing proper buildings for the scholars, warming and keeping them in order, and the general management and support of the school; but if the county elects to form the whole county into a high school district, then all that they are required to do by the terms of the Act is to raise such sums as are necessary for the “maintenance” of the high school. If the restricted interpretation which is contended for by the learned counsel for the appellants is to be placed upon this word, where are the funds to come from for the school accommodation and the support of the school, whatever those terms may mean? And the same reasoning would apply to the present case, where the council, instead of forming the whole county into a high school district, has selected a portion consisting of the town and township of Niagara. The portion so set apart becomes for high school purposes a separate district, although it becomes necessary to use the machinery of its separate councils for the purpose of raising the moneys required. The school itself, might have been built within the limits of the township and yet for all practical purposes the benefits enjoyed by the town might have been much larger than those derived by many of the inhabitants of the township, or *vice versa*.



It is to be regretted that the same language had not been used in each case, but it is manifest, I think, that whether in the case of cities or counties, or portions of counties set apart for these purposes, any deficiency in the amount required for furnishing the necessary accommodation, or supporting or maintaining the school, has to be made good by the ratepayers of the district within the jurisdiction of the high school board.

I am of opinion, therefore, that the *mandamus* was properly directed, and that this appeal should be dismissed, with costs.

HAGARTY, C. J. C. P., PATTERSON and MOSS, JJ. A., concurred.

*Appeal dismissed.*

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BROWN ET AL. V. SHAW ET AL.

*Sale of tea—Dispute as to weight—Construction of contract.*

The plaintiffs, carrying on business at Hamilton, sold a certain number of chests of tea, through a broker at Toronto, to the defendants, who were merchants at the latter place. Before shipping the goods, the plaintiffs ascertained the net weight of the tea, after deducting the weight of the chests, by a mode in general use in the trade, and sent an invoice charging defendants with the number of pounds so ascertained. Some days after the receipt of the goods the defendants wrote to the plaintiffs refusing to remit their notes for the amount charged, on the ground that the taring was incorrect, and added, "If you wish, we will have more of them tared, or you can send down yourselves, when I will settle." One of the plaintiffs thereupon came down to Toronto, and the goods were re-tared at defendants' warehouse, in the presence of the broker and the defendants' agent, when it was ascertained that the defendants were chargeable with 95 lbs. more than the plaintiffs had claimed. The defendants then sent their notes for the amount charged in the original invoice, and refused to pay for the additional 95 lbs.

*Held*, reversing the judgment of the County Court, that the defendants had bound themselves by their letter and conduct to abide by the result of the re-taring at Toronto, and were liable for the additional weight so ascertained.

APPEAL from the County Court of the County of Wentworth.

The plaintiffs were wholesale grocers at Hamilton. The defendants were wholesale grocers, &c., at Toronto.

On the 27th April, 1874, the plaintiffs, through Mr. Musson, a broker at Toronto, sold to the defendants a quantity of tea, viz., 100 half chests marked Harlaw  $\frac{1}{2}$  at 72 cents per lb.; and 90 half chests Harlaw  $\frac{3}{4}$  at 53 cents per lb. in Hamilton, to be paid by note at four months, or cash less three per cent.

On the 28th April, the plaintiffs forwarded the tea, with an invoice, shewing the weights of the several packages. These figures were arrived at by weighing the chests and deducting from the gross weight of each package of the higher priced tea fourteen pounds for tare, and from each of the other packages fifteen pounds.

This tare was arrived at by a process which was described as follows:—

Several chests are taken from the lot and are emptied and weighed to ascertain the average weight of the chests. If the average contains a fraction of a pound under half a pound, the fraction is rejected. If it is half a pound or over, a pound is added. Thus 14 lbs. 7 oz. is called 14 lbs. and 14 lbs. 8 oz. is called 15 lbs. The result arrived at in this way is taken as the tare to be allowed on each package of the lot.

This arbitrary mode of fixing the tare was said to be that in general use with the trade; and it was shewn on both sides that these contracts are made with reference to it. The plaintiffs shewed by their evidence that the custom was to take five packages as the test, when the quantity to be "tared," as they express it, exceeded 50 packages. One of the defendants said that he did not understand there was any rule of the trade as to testing any particular number of chests of tea to ascertain the tare, but he agreed that the tare was to be arrived at upon this system, so that a contract to pay for a number of chests of tea at so much per lb., was in effect a contract to pay for as many pounds as the chests and the tea together would weigh, less the tare per chest, ascertained on the system which was shewn.

The tare allowed by the plaintiffs was the result of a test of five chests of each of the kinds of tea, made at Hamilton by the plaintiffs.

The defendants did not send their note promptly on receipt of the goods. The plaintiffs pressed them for a settlement through Musson, and on 8th May they wrote a letter to the plaintiffs, which letter was in these words :

“GENTS.—I would have sent you a settlement for your invoice before this, only that the tares are wrong. Mr. Musson has seen three of  $\frac{1}{2}$  tared, and this afternoon I will have the  $\frac{3}{4}$  tared ; so far, all that Mr. Musson saw tared here, were over  $14\frac{1}{2}$  lbs.—14 lbs. 8 oz., 14 lbs. 10 oz., 14 lb. 11 oz. If you wish we will have more of them tared ; or you can send down and have it done yourselves, when I will settle.”

Upon the receipt of this letter one of the plaintiffs proceeded to Toronto, and with the assistance of Mr. Musson, the broker and the defendants' shipper, and in defendants' warehouse, tested five chests of each kind of tea. The result as to the higher-priced tea was the same as on the test made at Hamilton ; but the result as to the other tea gave only 14 lbs. tare, while 15 lbs. had been allowed in the invoice.

This was done on the 11th May. On the 13th the defendants wrote to the plaintiffs with notes dated 30th April for the amount shewn by the invoice of 28th April. The plaintiffs retained and made use of these notes, but wrote to the defendants on 15th May stating that the notes were only accepted in part settlement, and enclosing a statement claiming \$50.35 per one lb. per chest on 95 chests, the number furnished in place of the 90 sold by the broker ; \$2.74 for interest for the two days from 28th to 30th April, charged upon the ground that the tea was deliverable in Hamilton ; and \$8.97 for bank agency, charged on the same ground, as the defendants' notes were payable in Toronto and not in Hamilton.

This action was brought to recover these items.

The case was tried without a jury.

The learned Judge, upon the evidence given at the trial, found as follows :—

1. I find that there was no absolute correctness in the system adopted in the taring of the teas either at Hamilton or Toronto.

2. I find further, on Mr. Routh's evidence, that the taring at Hamilton was as likely to arrive correctly at the net weight, as that at Toronto.

3. I cannot find, in absence of positive evidence of the exact weights of the teas, that the Hamilton taring was incorrect, and that the taring at Toronto was the correct one. The modes adopted in both cases were only a comparative means of arriving at the net weights.

4. I think there must be an agreement proved, that the defendants should agree to and abide by the result of the "taring" at Toronto; or by the actual weight that the teas were short of the weights determined by the plaintiffs, themselves, at Hamilton. There certainly does not appear to me any evidence of an express agreement, nor do I think one can be implied from the acts of the parties.

5. I find the evidence of the defendants, both as to what took place about taring the tea at Toronto, and all the correspondence, do not in law shew such an assent to abide by such taring as would in law amount to their obligations to do so.

As to the five smaller items, I think that the plaintiffs' acceptance of notes, keeping them, and discounting them, and their being paid by defendants at maturity, and notwithstanding the letter written and statement sent defendants by plaintiffs, and the conduct of defendants, that the plaintiffs cannot recover on the whole evidence; on these and other points, I think the plaintiffs must fail.

A nonsuit was therefore entered.

A rule *nisi* was obtained to set aside the nonsuit and enter a verdict for the plaintiffs, pursuant to the Administration of Justice Act, 1873.



This appeal was from the decision of the learned Judge of the County Court, discharging that rule. (a)

The appellants' reasons of appeal were :

1. The sale was of a number of half chests of tea at so

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(a) The following is the judgment appealed from :—

SINCLAIR, Co. J.—The plaintiff complains of my finding on the facts of this case, and contends that he is entitled to have a verdict entered for him. The facts of the case are simple and easily understood. The firm of Brown, Routh & Co., (of which Brown has, since the trial of this case, become the sole plaintiff), through one Musson, a broker at Toronto, sold to the defendants, who are merchants in the latter city, 100 half chests of Young Hyson tea at 72 cents per lb., and 90 half chests of the same kind of tea, but I assume of an inferior grade, for 53 cents per lb., deliverable in Hamilton. The terms of payment were note at four months, or three per cent. off for cash. The brokerage, one per cent., was payable by the sellers. The sale was made on the 27th of April, 1874. Instead of shipping these quantities of the two lines of teas, the firm of Brown, Routh & Co. sent to the defendants 107 half chests of the former grade of tea and 95 half chests of the latter, in all 12 half chests more tea than the broker's sold note specified. I imagine that Brown, Routh & Co. sent that number of half chests additional because, as Routh said in his evidence, "these quantities closed our two lines of these teas." No objection appears to have been made by the defendants at any time to the 12 additional half chests.

The day after the sale-note was given by the broker, Brown, Routh & Co. sent to the defendants an invoice of the 107 and 95 half chests respectively. They pre-paid the freight (the teas having been deliverable at Hamilton) to Toronto. Before shipping the goods to Toronto, Routh, one of the partners of Brown, Routh & Co., had ascertained the net weight of these teas at Hamilton by a mode which he said was well known to the trade. This, he candidly admitted, was only an *arbitrary* method of arriving at the weights of teas, but was accepted by those in the trade as a fair test. On the 8th May, 1874, the defendants wrote Brown, Routh & Co. complaining that the taring at Hamilton was incorrect, and that they would not settle until (as I judge the meaning of their letter to be) they (the defendants) were satisfied of the correctness of the taring at Hamilton. In consequence of this letter Routh went to Toronto, and what occurred there is detailed in his evidence and that of the defendant Shaw. After Routh's return to Hamilton nothing appears to have been said or done by either firm for five days. On the 13th of May the defendants send their notes to Brown, Routh & Co. at three, four, and five months from the 30th of April, 1874, (the sale-note having been made three days before) for \$7178.03, being the exact amount of the invoice rendered by Brown, Routh & Co., including \$24.21, the freight to Toronto. It does not appear in evidence, except when Routh was allowed to be recalled, *where* the notes were payable. He said, "Our firm paid  $\frac{1}{4}$  per cent. on the collection of these notes over and above what we would have paid if they had been made payable at Hamilton." At the trial I asked the plaintiff's counsel if he intended to put these notes, then retired, in evidence on the question of exchange. He declined to do so, although the defendants' counsel had them in Court ready to produce if required. In reply to the letter enclosing the notes

much per pound, and no special agreement having been made as to weighing, the custom of trade must prevail;

Brown, Routh & Co. wrote the defendants on the 15th of May enclosing a statement of account afresh, claiming, in addition to the sum formerly claimed, interest from the 28th of May, when the goods were shipped at Hamilton, until the 30th of the same month, when the notes were dated. Brown, Routh & Co. also include in this fresh statement \$8.98, being, as they say, " $\frac{1}{8}$  per cent. agency," which I take to mean the bank charges for collecting notes in Toronto, and the sum of \$50.35 being for 95 lbs. of the tea sold at 53 cents per lb. The firm of Brown, Routh & Co. contended that, as the result of the taring of some of that line of teas in Toronto shewed one pound less tare on each half chest, that the defendants were liable to pay it. It is for these three items that this action is brought. Brown, Routh & Co., as it was admitted, kept the notes from the time they received them in the letter of the 13th of May, and never returned them to the defendants, except on payment at maturity. Just two years from that date this action was commenced. It is to be observed that the plaintiff's original charge for bank agency was \$2.74, and in his particulars of claim annexed to the record that item is put down at \$2.35. I think it most in order to decide first the plaintiff's right to recover for the pound of tea on each of the 95 half chests. The difficulty arises on this question from the fact that there can be no correct ascertainment of the exact weight of the teas from the arbitrary rule or custom which appears to have been applied in this case. Routh said, "My taring in Hamilton was correct of the five chests on each line of teas. The tares were absolutely correct of these five chests of each line of teas." It appears that the custom of the trade is, according to Routh's evidence (corroborated by the testimony of the witness Gillard) that any quantity "over 50 half chests of tea is tared by taking five packages indiscriminately, emptying the chests or packages; weighing each chest or package separately to the exact number of pounds and ounces; the total weight of the five are then added together and divided by five (the number of packages) and the result is the tare on each chest or package. Should, for instance, the tare on each box or chest amount to 14 pounds and 8 ounces or over, the tare is taken at 15 pounds; but should the tare be, for instance, 14 pounds and 7 ounces, then the tare would be taken at 14 pounds." Again Routh says: "The taring by our invoice of the 95 half chests was allowed at 15 pounds to the half chest, and the re-taring of these packages at defendants' warehouse was 14 lbs to the half chest." He says further: "There is no absolute correctness in taring teas in the manner I have described. Any other five chests of the same tea might be different. As a matter of fact the defendants might have had a pound more or less on each half chest than the quantity I arrived at in Hamilton." It will then be seen that the mode adopted at Hamilton and Toronto to ascertain the net quantities of these half chests was in no sense strictly accurate. No five chests of tea would probably weigh exactly the same. There might not be the same specific gravity of the tea in each half chest through atmospheric or other causes. There might be a difference in the weight of the boxes though made from the same kind of wood, and many other reasons might be given for the variableness in weight of any five half chests that might be selected. Routh says that the weight of the five half chests weighed at Hamilton was "correct," but that there was "no absolute correctness" as to those not weighed, but only estimated.

that is, the parties were to be bound by a test giving, not the actual weight, but the arbitrary weight, upon which

by the rule I have mentioned. The weight arrived at in Toronto could not be more accurate. On this evidence, and for the reasons I have given, I think the first three findings at the trial must be sustained.

(The learned Judge here discussed the objection that the contract was incomplete, upon which he decided in favour of the plaintiffs. This part of the judgment is omitted as nothing bears upon it in appeal.)

It was further urged that the taring at Hamilton was by the act and consent of the parties done away with, and the "re-taring" at Toronto substituted for it, and that the defendants, by their letter and conduct, bound themselves to abide by the "re-taring" at Toronto. It is necessary first to look at the defendants' letter of the 8th of May, 1874. They say: "I (we) would have sent you a settlement for your invoice before this, only that the tares are wrong." They say further on: "If you, (Brown, Routh & Co.) wish we will have more of them tared, or you can send down and have it done yourselves, when I will settle." In response to this letter Mr. Routh, one of the plaintiffs' firm, went down to Toronto, and what occurred there is told by him and the defendant Shaw. On reference to their evidence it will be seen that nothing more was said or done than that Routh desired to "re-tare" the teas complained of, and that defendants sent one of their men to assist in doing so. The defendant Shaw, whom Routh saw, was just going out of his warehouse on business, and to assist Routh in the "re-taring" he told his men to bring down for "re-taring" the five or seven half-chests which remained after the sale to Lamb & Cross. He says he did not know of the result until "about a year afterwards," as he "left shortly afterwards for England." Now I cannot see anything more in the defendants' letter than this: "We have sold part of these teas to Lamb & Cross. Some of them have come out short of your taring on which (100 half chests) we have had to allow these purchasers one pound on each—more tare than your invoice shews. Send some one down to 're-tare' the teas, and if we thereby find that your taring is correct we will settle with you, but not until then."

When Routh went to Toronto on the 10th or 11th of May, 1874, he says: I did not go down in consequence of Lamb & Cross's claim for shortage on the defendants, but to get a settlement of my claim with them." In his conversation with Shaw, which could only have occupied a very few minutes, he did not ask Shaw to be bound by this "re-taring," nor did Shaw say anything about it, nor did he tell Shaw that he would be bound by it. After the "re-taring" Routh informed defendants' man that he "intended to make defendants pay for the extra quantity as ascertained in the re-taring." Had either of the defendants been present and nothing said in reply it might be some evidence of assent, but when said to a hired man about a warehouse it certainly could not bind the principals. I remarked to plaintiffs' counsel on the argument of the rule *nisi* that if I could be satisfied of the "re-taring" at Toronto as fixing with positive accuracy the weights claimed by the plaintiff as being correct, I could see the force of his argument; but as Routh said "any other five chests of the same tea might be different," the question of exact weight was left at large. There being, therefore, no evidence of positive weight, I am asked in the face of Routh's and Shaw's testimony to say that there was an agreement arrived at in Toronto, express or implied, by which defendants agreed to pay for anything found to be over the weight arrived at



the total price would be ascertainable. 1 *Smith's L. C.* 598, *Story on Sales*, sec. 794-802, last ed.

in Hamilton. There should, in my opinion, be such an agreement for that purpose as would be equivalent to a reference of disputes in ordinary transactions. "If the "re-taring" at Toronto proved that there was less tea than was ascertained at Hamilton the plaintiffs could have still insisted that the "taring" at Hamilton was correct. It would be a matter of evidence to say which was the more likely to be correct. The plaintiffs would not be bound by the "re-taring" at Toronto, but could still insist that their invoice quantities were correct, and if they could convince a Judge or jury, in an action for defendants not delivering the promissory notes, of that fact, what would there be to prevent a recovery by the plaintiff. I see nothing that Shaw said which would have that effect, and if there was no mutuality there would be no obligation. I am not sure in that case but that a Court would be more disposed to consider the "taring" at Hamilton which Routh said of the five half chests weighed there was "correct," to be more reliable than the "re-taring" at Toronto. It is to be observed that Routh was not asked, nor did he say, that the "re-taring" at Toronto was as "correct" as the taring at Hamilton. It may have been that there was a difference in the scales: for those used at Hamilton Mr. Routh may have had properly tested, but nothing of the kind appears to have been done with those used in Toronto. I mention this as being a reason why Mr. Routh may have spoken of the correctness of the taring at Hamilton with more positiveness than that at Toronto. But it is urged that the defendants not having replied to the letter of the plaintiffs' firm of the 15th of May, 1874, they are concluded by the statement of account therein rendered and of the contents of that letter. "It should be observed that although silence has been considered to be evidence of assent to a statement made orally in the presence of the party, no such inference can be fairly drawn from the mere omission of a party to reply to a letter, unless sent under circumstances which entitle the writer to an answer."—*Roscoe on Evidence*, 13th ed., 68. In *Lucy v. Mouflet*, 5 H. & N. 232, Pollock, C. B., says: "The acquiescence to be presumed from a person's failure to answer a letter must depend upon the circumstances of the case. A man is not bound to answer an unreasonable letter." In *Richards v. Gellatly*, L. R. 7 C. P. at p. 131, Willes, J., says: "It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded, and the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected." Should a reply be properly expected in this case? Brown, Routh & Co. did not, immediately after the "re-taring" at Toronto, notify the defendants that they would not accept a settlement on the basis of the invoice weights, but only on the quantity ascertained by the process of re-taring. They awaited the notes which the defendants sent them in pursuance of plaintiff's invoice. They kept these notes themselves or discounted them with their banker. They saw that the notes bore date the 30th of April instead of the 28th. They saw that they were payable at Toronto instead of Hamilton; yet, notwithstanding all these facts, they chose to accept them, kept them, and in due course received payment of them, and now attempt to get over the effect of that position by



2. The defendants, not content with the test made by the plaintiffs, insisted on a new test being made, which the plaintiffs conceded, though they were not bound to do so, and the arbitrary weight so ascertained is to govern. In their letter of 8th May, 1874, they say: "We will settle" when such a test is made in Toronto. The test was made in Toronto in the presence of all parties, in the result of which all parties agreed, and that test, in connection with the letter of the 8th May, 1874, should bind the defendants. It cannot be said that if the conclusion arrived at in Toronto had been in favour of the defendants the plaintiffs would be bound by it, but, as it was in favour of the plaintiffs, defendants are not to be bound by it. The fact that the teas could not be tared in accordance with the

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saying that they wrote defendants making a further demand—the subject-matter of this suit. The firm of Brown, Routh & Co. were not bound to accept these notes payable at Toronto, and probably they were entitled to the two days' interest, but they could not repudiate the payment in part and take advantage of its most substantial portion. They could have returned these notes and asked for those to which they considered themselves entitled under their contract. The defendants sent the notes "in settlement of your (plaintiff's) invoice of the 28th ult." (See letter of 13th May, 1874). The plaintiff could not, in my opinion, retain these notes and receive payment of them, and then turn round and say they were not payment. Brown, Routh & Co. should have assumed one position or the other, either to have handed defendants back their paper and stood at arm's length, and demanded their rights as the contract gave it to them, or, if they took something different, to be satisfied. They look one way and travel the other. I think their steps should determine whither they were travelling, and the consequence of the course they pursued. The defendants were justified in regarding the acts of Brown, Routh & Co. rather than the petulant tone of their letter, and were not in my opinion, on the authorities cited, called on to make any reply to that letter. It is to be observed that defendant Shaw said he did not know of the letter for upwards of a year afterwards. He was not asked if he had informed his partners and co-defendant, or any one in their employ, what had occurred between him and Routh. It would, I think, be straining it against defendants unjustly to say that defendants should be bound by acquiescence, when, as a matter of fact, those in charge of the business at Toronto might not have known what answer to make, or particularly what its exact bearing should be, in view of what had occurred between Shaw and Routh. It may be said that Shaw's partner or servants should have communicated the contents of the letter to him in England, but I do not think such an omission can be distorted into acquiescence.

For the same reasons I think the charges for interest and bank agency are not recoverable.

I also refer to the case of *Caine v. Coulson*, 1 H. & C. 764; *Benjamin on Sales*, 2nd ed., 584, 585.

I think the plaintiffs' rule must be discharged, with costs.

custom of trade with absolute correctness, only strengthens the reason why the tare arrived at when all parties were present, in the correctness of which all concurred, should be taken to be binding.

3. As to the items for interest and commission, by the letter of the 13th May, 1874, and the notes payable in Toronto, the defendants proposed to vary the contract of sale as evidenced by the sold note, exhibit 1. By the contract the money was payable in Hamilton, and the sale was on the 27th April, and the notes were dated two days later. The plaintiffs by their letter of 15th May, 1874, produced by defendants at the trial, immediately said, we will accept the notes on account only. In this the defendants acquiesced by their silence, and their payment of the notes after notice of the manner in which they would be applied. If the defendants did not accept the terms of the plaintiffs' letter of 15th May, 1874, it was their duty to have repudiated them, and the notes might then have been returned; but the defendants having acquiesced in the terms of that letter, the plaintiffs collected the notes on account. Among merchants an account rendered will be regarded as allowed, if it be not objected to within a reasonable time. *Taylor on Evidence*, 3rd ed., pp. 660 et al.

The respondents' reasons against the appeal were:

The respondents submit that the appeal is against the finding of the learned Judge of the County Court on evidence, and that this Court will not entertain an appeal from the County Court, where the decision turns wholly upon the evidence, and involves no point of law: *Hastings v. Earnest*, 7 U. C. R. 521; *Fowler v. McDonald*, 3 U. C. R. 385; *Bradley v. Crane*, 4 U. C. R. 122; and many other cases collected in *Rob. & Jos. Digest*, p. 848.

That the decision of a Judge without a jury will be regarded differently from the finding of a jury, and will not be interfered with unless there is no evidence to sustain it: *Smith v. Hamilton*, 29 U. C. R. 400; and *Templeman v. Haydon*, 12 C. B. 507, cited in *Smith v. Hamilton*, on pp. 398 and 400; and especially would this

be so where the whole amount claimed is so small, being only about \$62.

That, upon the evidence, the finding is correct, for the following reasons, as to the first and second grounds of appeal :

The appellants' case rests on the ground that the respondents received more tea from the appellant than they paid for, and this can be supported only,—First, by direct evidence as to actual weight differing from appellants' statements of account ; or, second, by evidence that binds the respondents by the weighing or re-taring at Toronto.

a. The evidence of the witness Routh, one of the plaintiffs in the Court below, leaves no room to doubt that, for all that appears, respondents may have received even less tea than they paid for ; at any rate as against the appellants, if the taring in Hamilton, at appellants' warehouse, be correct (and Routh swears it was), then respondents received no more than they paid for.

b. The evidence does not shew that respondents were bound by the taring at Toronto. The letter of 8th of May is relied upon by appellants as shewing an agreement by respondents to settle according to taring at Toronto. Respondents submit that this letter shews a claim by respondents for an allowance on first line of 107 half chests ; and that a promise to settle after a further taring certainly will not be presumed to mean a promise to abandon this claim at the appellants' demand, and also a further yielding to the appellants' demand for an allowance on second line ; but, merely, "if you, plaintiffs, wish to re-tare, you may do so, and then we will have a settlement." What that settlement was to be neither party clearly defined in writing, and unless we can derive from the letter itself a positive agreement to abide by this re-taring, the subsequent conduct of the parties will not, it is submitted, lead to the conclusion that they came to any mutual agreement or *consensus* to refer ; and if the letter and conduct are capable of two modes of interpretation, the learned Judge has found that the respondents did not intend to bind themselves by the re-taring at Toronto.



c. As to the subsequent conduct of the parties. Appellants' letter of 15th May, after the taring, is in the nature of a threat, rather than evidence of agreement. It, in effect, says, "Because you put us to trouble we will make you pay for it." Also Routh's statement to respondents' man who helped in taring the teas: "Shaw's man said the tare was short; I told him I was going to make Shaw pay for it." The forwarding by respondents of the notes shews that there was no intention on their part to abide by the re-taring. See letter of 13th May, which is a clear tender of their notes, "as per memo. at foot."

d. The appellants, in reply, refuse by words to accept these notes except as in part payment; yet, in fact, do accept them, and place them to account of respondents. Apart from the question as to how this acceptance affects the appellants, it is clear that the parties are still at issue as to tare, respondents offering to settle on the first taring and first invoice, and appellants wishing to abandon first taring and to force a settlement on second taring. Respondents submit, however, that the plaintiffs should have returned the notes, and not having done so, they must be held to have accepted them as tendered. See remarks of Martin, B., in *Caine v. Coulton*, 1 H. & C. 764; 32 L. J. Ex. 97, and cited in *Benjamin on Sales*, 2nd ed., p. 585. "He says one thing, but he does another. He kept the banker's draft. It seems to me to be common sense to look at what is done, and not at what is said."

2. If anything is to be intended against appellants from their acquiescence or want of action, the respondents would call attention to the date of the letter, viz., 15th of May, 1874, and date of next, 13th of May, 1876, being subsequent to an action brought by respondents against appellants.

3. The appellants do not declare upon an agreement to refer.

As to the third ground of appeal, respondents submit:

1. That they are not in any way bound or prejudiced by not replying to the appellants' letter of 15th May, 1874, enclosing statement of account: *Price v. Ramsay*, 2



Gibb & Sy. 338, 342, 343; *Fairlie v. Denton*, 3 C. & P. 103; *Doe dem Frankis v. Frankis*, 11 A. & E. 795; which cases are cited in *Taylor on Evidence*, 6th ed., pp. 716, 717; and Eng. ed. pp. 734, 735; also *Felthouse v. Bindley*, 11 C. B. N. S., 869, 31 L. J. C. P., 204; and cited in *Benjamin on Sales*, p. 34.

2. There is no evidence before the Court as to where the notes were made payable. Respondents had the notes in Court under a notice to produce, served by the appellants, as the appellants knew; and the appellants not choosing to put them in, nothing will be intended in their favour.

3. There is no evidence where they should be payable. The bought and sold notes were not evidence of the contract, as they did not relate to the goods sold, but to some other and less quantity.

4. There is no evidence as to where the notes were paid. The notes might have been some evidence, as they would have shown the marks of transmission from one bank to another; but these were not put in. The evidence given on this point was that  $\frac{1}{4}$  per cent. was paid to the bank in Hamilton, but if this was for collecting notes, it is not shown when such collection was made. For all that appears, it might have been for collecting at some bank in Hamilton, other than their own, and there was nothing requiring the respondents to make the notes payable at any particular bank.

5. As to claim for interest: There is no evidence when goods were delivered, and payment would not be due until delivery, either in Hamilton, or wherever contract might call for; or, at all events, until readiness to deliver. *Benjamin on Sales*, p. 583. And there is no evidence as to when the goods were ready for delivery. The appellants might have put in shipping note or other evidence as to date of delivery, or readiness to deliver, and not having done so, cannot now claim interest. As a matter of law, the respondents submit interest could not be charged until after written demand, informing defendants that it would be charged from date of demand, and then only from date

of demand : Consol. Stat. U. C., p. 449 ch. 43, sec. 2. Comparing date of letter, 15th May, 1875, with the date of promissory notes, as shewn by the statement of same date to be April 30th, 1876, the notes were dated long prior to any demand of interest.

6. The appellants accepted notes. See ante *Caines v. Coulton*.

7. The amount involved as to interest and commission is only \$11.71, and even if this Court were not well satisfied with the finding on these points, they would not disturb the verdict, where so small a sum is involved, the policy of the Courts being to discourage litigation as to small claims.

As to the whole case : There is nothing to shew that the respondents derived any profit or advantage from the alleged overweight. On the contrary, a loss of 100 lbs. of tea was sworn to by Shaw. Respondents submit, therefore, that the Court will be astute in supporting a sale on plaintiff's own weighing, the weighmaster's certificate, and the invoice delivered to the defendants, all of which the plaintiff Routh, swears to be correct.

The case was argued on the 6th January, 1877.

*C. Robinson*, Q. C. for the appellants.

*J. E. Rose* for the respondents.

The arguments and cases cited fully appear in the reasons for and against the appeal.

February 20th, 1877 (*a*). PATTERSON, J. A.—There is evidently a mistake or oversight in the formal proceedings. The rule *nisi* asks to set aside the nonsuit and enter a verdict, but it does not state, nor is it anywhere stated, that leave was reserved for such a motion. There is no statutory right to move without leave, the Acts 33Vic. ch. 7, sec. 6, and 37 Vic. ch. 7, sec. 33, both referring to verdicts and not to nonsuits. It is true the motion might be by

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(*a*) *Present*.—BURTON, PATTERSON, MOSS, JJ.A., and GALT, J.

consent, but in that case there would be no appeal, either under Consol. Stat. U. C. ch. 15, sec. 67, or 27 Vic. ch. 14, sec. 2.

The reference in the rule to the Administration of Justice Act, 1873, is evidently a mistake. The Act intended is apparently 33 Vic. ch. 7, sec. 6. The learned Judge and the parties appear to have treated the case, and it certainly was argued before us, as if a verdict for the defendant had been entered and a new trial moved for under the Law Reform Act of 1868, sec. 18, sub-sec. 2, in which case the Act of 1869, 33 Vic. ch. 7, sec. 6, authorizes what the rule asks for.

It will be well, however, to have the verdict for defendant formally entered on the record in place of the nonsuit, and the rule *nisi* amended by making it in form a rule for a new trial, so as to make the papers correspond with the understanding on which the case has proceeded.

In discharging the rule *nisi* the learned Judge gave a carefully considered judgment, adhering to the views taken by him at the trial, and reading the defendants' letter of the 8th of May, which was the evidence most strongly relied on by the plaintiffs, as being to this effect: "We have sold part of the teas to Lamb & Cross. Some of them have come short of your taring, on which (100 half-chests) we have had to allow the purchasers one pound on each more tare than your invoice shows. Send some one down to retare the teas, and if we thereby find that your taring is correct we will settle with you, but not till then."

The question for decision was a question of fact—what was the contract?

Mr. Rose argued that an appeal would not lie from a decision upon a question of fact; referring to several cases in which the Court of Queen's Bench had refused to disturb the finding of a Judge of the County Court on questions of evidence, as well as to some other cases, such as *Smith v. Hamilton*, 29 U. C. R. 394, in which the Court declined to disturb the verdict of a Judge moved against under the Law Reform Act of 1868; Mr. Justice Wilson, who gave

the judgment of the Court, resting the decision on the very proper and sound rule, which has been occasionally allowed to slip somewhat out of view, that the finding of the Judge should not be disturbed, unless the Court can say that his conclusion on the facts before him was an absolutely wrong and mistaken one, though not the one which another Judge on reading the evidence might think should have been come to.

The rule invoked by Mr. Rose does not touch the jurisdiction of the Court. It serves merely to guide the Court in the exercise of a wise discretion, and therefore furnishes no obstacle to the entertaining of the appeal. Besides, it would scarcely apply in the present case. No question of credibility of witnesses arises, and there is no conflicting testimony. The question of fact on which the case turns depends on the proper view to be taken of facts which are not in dispute.

After carefully considering the evidence and the able statement by the learned Judge of the grounds of his decision, I am unable to arrive at his conclusion. The difference of our views is probably explained by our not understanding in exactly the same way the original contract evidenced by the sold note of the broker. Reading that contract with the knowledge of the system of adjusting the tare, I see no difficulty from the absence of evidence of the true weight of the tea. The defendants' contract is in my view, to pay, not for so many pounds of tea as the chests shall be shown to contain, but so much a pound for the gross weight of chests and tea, less the tare ascertained in the understood manner.

It is not disputed that the tests made both at Hamilton and in the defendants' warehouse at Toronto were properly made; but as this test is not only an arbitrary mode of arriving at what is taken for an average, but is so liable to fluctuation that no two tests can be relied on as likely to shew the same result, the important question is, which test was the defendant bound by.

The evidence does not go the length of shewing that he



was bound by that made by the plaintiffs at Hamilton, so as not to be at liberty to dispute its accuracy. And after disputing it as he did, he cannot say he was so bound. Neither can it be questioned that the parties were at liberty to agree upon how and where a binding test should be made. I think they did so agree; and that they were both bound by that made at the defendants' warehouse. I think that is the necessary effect of the letter of the 8th of May, and of the plaintiffs' compliance with it; and that that appears with fully as much force if we read the letter in the words suggested by the learned Judge, and which I have already quoted, as if we read the letter itself. Taking its effect to have been, "send down some one to re-tare the teas, and if we thereby find that your taring is correct, we will settle with you, but not till then;" and that plaintiffs acceded to the proposal, what are we to understand their agreement to have been? Undoubtedly, if the second test exactly confirmed the first, the defendants were to pay the invoice price; but what if it varied in the defendants' favour, as they expected it to do? Were they in that case, ever to pay? Certainly not, if they were only to pay in case the two tests agreed. But if they were to pay, were they to pay the invoice price, which the new test had shown to be excessive? They would hardly have contended for that construction of their letter.

The words of the letter itself, "If you wish, we will have more of them tared; or you can send down and have it done yourselves, when I will settle," cannot be understood as meaning anything less than we will not pay according to your adjustment. Let us have the tare adjusted afresh, and we will settle according to the more authoritative adjustment.

If the promise to settle means, as I think it does, to settle according to the new adjustment, it may be either taken as making certain what was left uncertain or unprovided for in the broker's contract, by ascertaining the mode of arriving at the tare; or as a new promise on a good consideration, as the sending down and having the test made

was undoubtedly a sufficient consideration to support the promise to pay according to the result shewn.

In my opinion the plaintiffs are entitled to a verdict.

The amount is, in any case, a trifle, and neither the action nor the defence indicates the spirit in which one would expect to see business carried on by merchants of the apparent standing of these parties. They are insisting on their strict rights; and as they think it not unworthy of themselves to litigate about trifles, the amount may as well be strictly computed.

The plaintiffs had no right to call for payment on the basis now asserted till the tare was ascertained and an account rendered. This was only done on the 15th May.

At that date the plaintiffs were entitled to \$7,178.03, plus \$50.35, making \$7,228.38, either in cash, less three per cent., or by note at four months.

They received notes which they accepted as equivalent to notes at four months. They were dated 30th April, and were for \$7178.03. Their value therefore, in relation to this transaction, was their nominal amount with interest for fifteen days added, say \$17.94, making \$7195.97, from which the item of \$8.97 for bank agency should be deducted, leaving the net payment \$7187, and the balance unpaid \$41.38, for which the verdict should be entered. I would allow no interest on the balance.

The appeal must be allowed with costs, and the rule in the Court below made absolute to enter a verdict for the plaintiffs for \$41.38.

Moss, J. A.—I confess that I was at first much impressed with the strength of the views advanced by the learned Judge of the County Court in his able and elaborate opinion. Further consideration, however, has satisfied me that his conclusion cannot be supported. The real question is, what was the final and concluded contract between the parties. Its inception is evidenced by a bought and sold note made by Mr. Musson, a broker. By this it appeared that on April 27th, 1874, he sold on

account of the plaintiffs to the defendants 100 half chests of tea at 72 cents per lb. and 90 half chests at 53 cents per lb., payable by note at 4 months or 3 per cent. off for cash. The number of chests actually delivered was somewhat larger, but this is immaterial, and the case is to be treated as if the larger number had been specified.

This was obviously a contract in which every element was settled, except the number of pounds. For the ascertainment of this number it is conceded that the custom of trade must be imported into the bargain. It was never intended that the quantity of tea should be actually weighed, but resort was to be had to the custom by which the quantity is fixed by running the tea from a certain number of boxes, weighing the boxes, and dividing the sum of their weights by their number, after which the quotient is accepted as the average weight of each box subject to the qualification that the number of ounces in the quotient if less than eight are disregarded, and if eight or more are taken as a pound. This arbitrary standard being fixed, all that remains is to weigh the boxes of tea as they are, and deduct from the sum the product of the number multiplied by this assumed weight of each box. This mode of adjusting the tare was adopted by the plaintiffs at Hamilton, and on the 28th April they forwarded the teas with an invoice stating the quantity according to the result of their weighing. On the 8th of May the defendants sent the letter, which my brother Patterson has read. Now, what was the position of the parties at that time? There is no room for the contention that the defendants were absolutely bound by any adjustment of the tare which the plaintiffs chose to allege. While it is true that by the custom they were bound to pay for the number of pounds ascertained in the process which has been described, they certainly were not bound to concede that that process had been properly or fairly conducted by the plaintiffs. The custom is not proved by any means to go the length of concluding the purchaser by an adjustment of the tare made by the vendor in his absence.

Such a custom would be in the highest degree unreasonable and unjust. The adjustment, to be absolutely conclusive, must be intended to be made to the satisfaction of both parties.

Probably as a rule the purchaser is content with the vendor's statement, or verifies its approximate correctness by a trial for himself. A difference of a pound in the tare he knows is not a result to cause surprise. But where he is not content, it is difficult to see how on any principles of justice he is to be absolutely bound by the vendor's statement. At any rate it is not for the defendants to say, in the absence of express evidence, that that is the effect of the custom. That was not the understanding of its nature upon which they acted. Their letter says that they would have sent a settlement for the invoice before this only that the tares were wrong. So the plaintiffs' ascertainment of the tares was not, in the defendants' view, conclusive. The tares being wrong must be corrected, and until corrected, they were not, they in effect declared, called upon to settle.

If wrong, how were they to be made right? The letter supplies an answer. The defendants offer either, as they express it, "to have more of them tared," or suggest as an alternative that the plaintiffs can send down and "have it done themselves" *when they will settle*.

The plaintiffs, perhaps, not feeling more confidence in the result of the defendants' proposed conduct of the process than the defendants had been willing to extend to them, adopt the latter course, and one of their firm comes from Hamilton to Toronto where, at the defendants' warehouse, in the presence of the broker and the defendants' agent expressly authorized for the purpose, weighings and calculations are made in accordance with the custom, and lead to the result that the plaintiffs had allowed too much for tare.

If this adjustment were to be accepted the defendants were chargeable with 95 lbs. of tea of the cheaper quality, more than claimed by the plaintiffs' original invoice. The plaintiffs were content to abide by this result, as we are bound to believe after their action they would have



been, and as the defendants certainly would have been, if this readjustment had made a pound less on each of the 95 chests. It was not unreasonable for the plaintiffs to expect the defendants to accept as binding the result of this new weighing, which they had themselves suggested.

Both parties had treated the weighing at Hamilton as inconclusive. The plaintiffs had been at the trouble of sending one of their firm to Toronto to settle the number of pounds in the manner proposed by the defendants. Yet the defendants think themselves justified in saying to the plaintiffs:—Now, that by taking the weights at our warehouse in accordance with the custom and in compliance with our wishes, it is found that you have charged us too little, we are willing to accept your invoice, which we disputed before.

I think that position is wholly untenable, on at least two grounds. First, by the purchasers objecting to the result of the weighing at Hamilton, and by the sellers yielding to that objection, it was agreed that the quantity should be finally determined by the repetition at Toronto of the process prescribed by the custom. Secondly, after inducing the plaintiffs to incur the trouble and expense of a re-investigation they are estopped from going behind its result. They knew that however fairly the weighing and calculation had been made at Hamilton, another trial at Toronto might shew a different result, just as might have been the case if other chests had happened to be taken in Hamilton. If the trial in their own warehouse had been in their favour, they would unquestionably have held the plaintiffs to its consequences. Upon what principle can they be permitted to ignore it, because it proved adverse?

The learned Judge appears to have been largely influenced by the undoubted fact that it was at the time of the trial impossible to ascertain the positive weight of the tea. I confess that this does not appear to me to be of any importance. It was never contemplated that the amount to be paid should be determined by the actual weight. In

fact, when the defendants wrote their letter, it was absolutely impossible to arrive at this, because a large portion of the tea had already been sold. It was a binding ascertainment of the weight in accordance with the custom, which was to settle the sum payable by the defendants. Even if the plaintiffs might, as the learned Judge thought, have insisted that their invoice quantities were correct, they had waived that right, and as I think consented to make the trial at Toronto binding. It is of no consequence that the result of the weighing at Toronto may not have been more correct than of that of Hamilton, for the last mentioned was abandoned by both parties.

I cannot see the force of the argument that the plaintiffs by accepting notes for the amount of their first invoice surrendered their position. They expressly received them on account, and set up their present contention. If money had been remitted they surely would have accepted it on account, and I fail to perceive any difference in effect from the receipt of notes.

While I differ from the learned Judge in his conclusion, I desire respectfully to express my satisfaction at the clear statement of the findings in fact, and of the legal principles which he deems applicable, contained in his judgment; and I cannot avoid adding that its value has been enhanced by the contrast it exhibits to some cases in which we are left to grope our way in the uncertain light furnished only by the pleadings and curt notes of the evidence.

I agree that an order should be made in the terms indicated by my learned brother.

BURTON, J. A., and GALT, J., concurred.

*Appeal allowed.*

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## IN RE GEORGE RANDOLPH, AN INSOLVENT.

*Partnership—What constitutes—Sharing the profits.*

Randolph and brother were lumber merchants at Stayner. Peckham & Hoag, of Toronto, received consignments of lumber from them for sale, and accepted their drafts drawn against such consignments. P. & H. were paid by commission until 1872, when the Randolphs dissolved. It was then agreed that the business should be carried on by George Randolph; that P. & H. should receive one-half the net profits of the business, to be credited to them upon a statement and settlement of mutual accounts each year, instead of a commission as formerly, and should guarantee all sales made by them; and that the amount then due to P. & H. should be carried to the debit of George. No provision was made in respect of losses, but by a special agreement when Randolph's mill and a large quantity of lumber were destroyed by fire in 1873, P. & H. shared half of the loss, partly, as they said, to save him from ruin, which would have destroyed all prospects of their getting paid what he owed them, and partly because they were to blame for not seeing that he was insured. P. & H. had access to Randolph's books, and the yearly balancing was done under their supervision. One purchase of timber land was made in the joint names of Randolph and a member of the firm of P. & H., which was said to have been by way of security to them, but it was paid for by Randolph alone.

George Randolph having become insolvent, P. & H. claimed as his creditors for the balance due them, but their claim was resisted on the ground that they were partners with the insolvent. It appeared from the evidence that no partnership was ever intended by the parties, and that they had never held themselves out as partners.

*Held*, reversing the judgment of the County Court, that no partnership existed.

APPEAL from the judgment of the Junior Judge of the County Court of the county of Simcoe.

The claimants, Peckham & Hoag, claimed to rank as creditors of the insolvent Randolph for \$27,000, and the inspectors of the insolvent's estate contested the claim on the ground that Peckham & Hoag were partners with the insolvent.

It appeared that George Randolph, the insolvent, and his brother, carried on the business of sawing lumber at Stayner for the American market. They had a grocery store for the purpose of supplying the men about the saw mill, and a blacksmith's shop, which was also connected with the mill; but neither the grocery store nor the blacksmith's shop were confined to dealings in connection with the lumber business.

Peckham & Hoag were lumber dealers at Toronto. They received the Randolphs' lumber, shipped it to Oswego, where they had a lumber yard, and sold it. They accepted their drafts upon them drawn against consignments of lumber, or at all events for the purposes of the business carried on by the Randolphs, and the proceeds were used in that business. They were paid by way of commission until the Randolph brothers dissolved partnership in 1872, when the following agreement was entered into: that George Randolph was to carry on the business at Stayner, manufacture the lumber, and ship it to Peckham & Hoag, at Toronto, where they were to receive it and take the necessary steps for despatching it to market and disposing of it, and was to be at liberty to draw upon them for amounts to be named from time to time. They were to receive and account for proceeds of all the lumber they sold. They were to guarantee all the sales they made, and account for the prices if the purchasers made default. They were to debit him with the amounts of their acceptances and credit him with the proceeds of the lumber. He was to keep an account at Stayner of receipts and expenditures; and they were, upon a statement and settlement of these mutual accounts each year, and an estimate of the net profits, to be credited with half these profits by way of commission for their services. The amount due Peckham & Hoag by Randolph and brother was carried to the debit of George Randolph.

No mention was made of losses in the agreement. It happened, however, in 1873, that Randolph's mill and a large quantity of lumber were destroyed by fire, which caused the balance sheet for that year to shew a loss, and Peckham & Hoag assumed half of that loss. This was shewn to have been by special arrangement, not the result of the general agreement. Peckham & Hoag agreed to assume the share of the loss, partly to save Randolph from being ruined, which would have destroyed all prospect of their getting paid what Randolph then owed them, and partly because they took some blame to themselves for not having taken care to see that Randolph was insured.



The books of Randolph were kept under the occasional superintendence and advice of one of the firm of Peckham & Hoag, who always superintended the yearly balancing.

One purchase of timber land was made in the joint names of Randolph and a member of the firm of Peckham & Hoag, which was explained to have been by way of security to Peckham & Hoag, and it was paid for by the funds of the business just as any purchase by Randolph was paid.

Randolph made an assignment on the 9th of April, 1875.

The claim was for the balance due on the acceptances of Peckham & Hoag. The account in evidence began on the 1st January, 1874, with a balance due Peckham & Hoag of \$26,423.61, and was closed on the 18th February, 1875, with a balance of \$26,247.75, exclusive of \$8,100 of acceptances not retired, but still held by the Bank of Toronto. The acceptances charged during the period covered by the account amounted to \$33,600. There were a number of other charges for cash outlay, &c., and credits given for receipts from sales, &c. The claim was described in the formal proof filed with the assignee as “\$26,247.75 for drafts held against said insolvent, and for balance of open account, as per statement attached with vouchers in proof of same.”

On these facts the learned Junior Judge of the County Court held that Peckham & Hoag were partners with Randolph, and disallowed the claim (a).

From this judgment the claimants appealed.

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The following is the judgment appealed from:—(a) 6th October, 1876. ARDAGH, Junior Co. J.—The insolvent, George Randolph, carrying on business as a lumber manufacturer at Stayner, on the 9th April, 1875, made an assignment under the Insolvent Act for the benefit of his creditors. In his schedule of creditors appear the names of Peckham and Hoag, (whose claim is now contested) for the sum of nearly \$27,000. At the first meeting of creditors, John Kerr was appointed assignee. Donald Campbell and Robert J. Griffiths were subsequently appointed inspectors of the estate. Shortly after Randolph's assignment, Peckham and Hoag became insolvent, and John Kerr was appointed assignee to their estate also. He, in August, 1875, filed a claim for Peckham and Hoag's estate against Randolph's estate for upwards of \$26,000. This claim the inspectors of Randolph's estate now contest, under the provisions of the 93rd section of the Insolvent Act of 1875, on the following grounds:—1st. That the claimants were all along partners of the insolvent; 2nd. Never indebted; 3rd. Set-off; 4th. Payment.

The appellants' reasons of appeal were :

1. That the said claim is a good and proper one, and was properly made against the insolvent's estate.

On these, issue was joined and evidence taken before me. The first ground, that of partnership, is the only one pressed by the inspectors; and there is nothing to shew that the account in dispute is not correct.

I have since carefully considered the evidence offered, the arguments of counsel thereafter, and the law bearing on the subject, as far as I am able to comprehend it, and I have come to the conclusion, not without some hesitation, that the claim of the estate of Peckham and Hoag must be rejected. The evidence, as I read it, goes to shew that after previous dealings had been going on between the parties up to 1871 or 1872, subsequently to that time what is spoken of as the "joint account," was entered into. Randolph describes it in this way: "For two or three years previous to January, 1875, Peckham & Hoag were creditors, with half the profits and debited with half the losses. They stand half and half of the loss and profit of the business. Previous to this they were paid by commission. I had no other connection with the firm of Peckham & Hoag, except that arising out of the Stayner business. My present liabilities arise out of my Stayner business entirely in connection with carrying on my saw mill business there. Peckham & Hoag had a share of the whole profits of my business, whether they sold, or I sold, the lumber. I did not consider nor intend to have entered into a partnership with them. It was a mutual agreement that could have been closed at any time."

S. T. Peckham's evidence is in part to the following effect: "The joint account was entered into some four or five years ago, that was, lumber was to be credited up or accounted for at net cost. We were to handle it and dispose of it, and divide equal with him, charging interest. That was to be our consideration in the matter. We continued doing business for him in the same way down to the time of his making his assignment. We were not in partnership in his business. No arrangement was made as to losses until after the fire, which took place in 1873, November. We had then a large claim against Randolph. I don't think it has been reduced since. The special arrangement after the fire was brought about in consequence of that loss. The question came up as to how the loss should be borne; finally we came to the conclusion to figure up what the lumber cost, and one-half the cost might be charged to us. I am not clear about debts, but our first arrangement was when we purchased lumber from Randolph, and our second was the joint account. We were entitled to one-half of the profits made on the lumber, whether Randolph sold it at the mill or we sold it in town; we took our chances for our commission, to divide with Mr. Randolph what was made over and above the cost."

The evidence of J. S. Peckham is to the same effect as to the joint account arrangement; and he states that the books of Randolph were made up every year under his supervision, and the result of the year's operations was then entered; that there were some purchases of timber land, (to use his own words) "I cannot say how it was paid for—it was from the business, and in the natural course of business paid from proceeds of business. The lands were bought in the name of Randolph and myself. The purchase was taken in my name, because I was acting and representing the firm. The business was buying, selling, and manufacturing

## 2. That there was not a partnership between the claimants and the insolvent.

lumber. Insolvent had a grocery store and a blacksmith shop for his own use. The profits of the store, selling to the men, came into the account of the general business; were taken into account before the division of profits. At the end of the year he rendered me an account of the amount of stock. The account was rendered to form part of the settlement. We had to shew stock on hand in order to shew profits. The stock on hand would be taken into estimates of our profit and loss. It was done every year. Some of the lumber at Oswego would be that taken from the land held jointly. The lot was charged to timber account. We were joint owners of the timber. The taxes on the land formed some of the statement of joint account. Some of the losses charged in insolvent's books were out of the store. I was aware of his making these charges; made no objection to it. Insolvent said he wanted to get some goods to supply his men with. He thought it would be a saving to pay them out of his store. We gave our consent; insolvent did not want to keep a separate account, and we consented. I supposed we were consenting to have the store account mixed up with the lumber account." The evidence of this witness is of great length, and I have made but a few extracts, which shew the nature of the arrangement between the parties.

The last witness called was William Wilson, the book-keeper in Randolph's business at Stayner, before and after the joint account. He says: "I kept the books under Peckham, Jr., (J. S.) and Randolph's instructions; I received instructions from Peckham both personally and in writing. I made entries in the books under his directions." [He then produces instructions in Peckham's handwriting of various dates; these to be understood, must be seen and examined thoroughly.] "The profit and loss account was always made up by Mr. Peckham. The instructions contained in certain letters to me from Peckham were acted on by me. I considered myself bound to obey these instructions as if Randolph had given them. I never received a profit and loss sheet from Randolph, always from Peckham."

The claim made in this case is one by Peckham and Hoag for certain losses by them in their dealings with Randolph from the commencement of their dealings with him, some seven years ago, up to the time of his insolvency in 1875. The evidence shews a different state of dealings by them with the insolvent at different times, but what the particular state of the accounts was at any particular point of time whenever a change in those dealings took place, does not appear. In view of this, I shall have to treat the whole claim as arising out of the particular relationship that existed at the time of the insolvency. One of the claimants in his evidence, says: "We had at the time of the fire (November, 1873,) a large claim against Randolph. I don't think it has been reduced since; the special arrangement after the fire was brought about in consequence of that loss. The question came up as to how the loss should be borne. Taking into consideration all these things, (he is speaking in reference to their having neglected to insure the lumber destroyed by the fire) and his, Randolph's, indebtedness to us, we came to the conclusion to figure up what the lumber cost, and one-half the cost might be charged to us." It would seem then as if some definite state of accounts was then arrived at, a balance struck, and that balance carried forward into the future dealings between the parties.



3. That the evidence does not shew any ground for pretending that either claimants or insolvent, for any fraudulent

Looking at all the evidence then, it appears to me that from this time out, the arrangement between them was, (1.) That Peckham & Hoag were to allow their money already in the business to continue there; to accept drafts drawn by the insolvent as money was required; to handle all lumber sent away for sale, charging all expenses of such sales against it, and to give credit for all sums received for such sales. It does not appear that any more money was advanced, for J. S. Peckham says: "I do not think we made any further advances in money subsequent to this. It was not contemplated that we were to advance any money, only to lend our name;" (2.) That Randolph was to continue to manufacture lumber, furnishing the necessary machinery, and making all improvements; charging purchase of logs and cost of manufacturing against the profits; (3.) That thenceforth there was a community of interest in profit and loss; and that Peckham & Hoag took as their share one half of the net profits of the business. The following facts appear to be established by the evidence: 1. That there was an agreement between those parties to share the profits and loss of the business, for though it was stated by the claimants in their evidence that nothing was said about losses at first; yet it is shewn that when losses did occur, they agreed to bear their share of them, and did so thenceforward, even in those occurring by bad debts; 2. That there were contributions by each towards the business, by the one in the way of capital, and by using their best efforts in disposing of the lumber; by the other, by supplying the machinery, making purchases or logs and superintending the work generally; 3. That Peckham & Hoag entered into all the different businesses carried on at Stayner—saw-milling, storekeeping, and blacksmithing—sharing the profits and contributing towards the losses on all; 4. That they not only acted as the agents for selling the lumber sent to them, but that they interfered with the business at Stayner. All the books were kept under and entries made in them by the direction of Peckham, Jr., and the balance sheet of profit and loss was always made out by him, in which the stock on hand was considered as being necessary to show what the profits were. And here may be noticed the distinction between the interest Peckham & Hoag might, as claimants, have in the *profits*, and that which they appeared to have in the *goods* by the sale of which those profits were to be produced; 5. That certain lands were also purchased on their joint account, as to which Jesse S. Peckham, says: "There were some purchases of timber land. I cannot say how it was paid for. It was paid for from the business, in the natural course of business, and from the proceeds of the business. The lands were bought in the name of Randolph and myself; the purchase was taken in my name, because I was acting and representing the firm; the business was buying, selling, and manufacturing lumber. In making up the account filed, we have not credited insolvent with half the amount of the lands. I do not know the value of the lands; do not know what the interest in these lands is worth, consequently did not give credit for it. Some of the timber sent to Oswego would be that taken from the lands we held jointly. We were joint owners of the timber. The taxes on the land formed some of the statement in joint account."

Both the claimants and the insolvent deny that there was any partnership entered into or intended; and this must be accepted as conclusive



or improper purpose, or with any view of obtaining credit, or in any manner held themselves out as being partners or in

on that point, that is, as regards their intention to stand in a certain relation to each other. The liability of claimants to third persons would arise then only from such acts of theirs as would go to show what is called a *quasi* partnership.

Mr. Lindley in his opening chapter, says: "Nothing perhaps can be said to be absolutely essential to the existence of a partnership except a community of interest in profits resulting from an agreement to share them. But although this is so, the usual characteristics of an ordinary partnership are a community of interest in profits and losses; a community of interest in the capital to be employed; and a community of power in the management of the business engaged in."

Now, although the intention of these parties was not to form a partnership, yet it may be well to consider how far their acts, viewed in the light of the above definition, would appear to shew that they had actually done so.—1. They had certainly a community of interest in profits and losses. This alone has been held to constitute a partnership: *Green v. Beesley*, 2 Bing. N. C. 108. This was a case where plaintiff agreed to convey by horse and cart the mail between two places, at so much a mile per annum, and to pay his proportion of the expense of the cart, &c., the money received for the carriage of parcels to be divided between the parties, and the losses to be also divided between them. Held, to constitute a partnership.

In the case we are now considering, it may be asked could the claimants have sued the insolvent for all the moneys advanced in case of a total loss of all the assets, *i. e.*, all the lumber, upon which claimants depended, in order from the sales to wipe out the liabilities they had incurred? and has not this state of things actually taken place? The claimants put so much into the business in order to obtain a share of the profits. These profits were ascertained after claimants were debited with their share of all the losses. They ran the risk by doing so of a total loss; and that loss has since occurred. On this head, Mr. Lindley says, p. 19, 3rd ed., "The writer is not aware of any case in which persons who have agreed to share profit and loss, have been held not to be partners."

2. As to a community of interest in the capital to be employed—this is more doubtful, it must be admitted, but it is not necessary that there should be any joint capital or stock; each may own absolutely a certain portion thereof. See *Fromont v. Coupland*, 2 Bing. 170. One may contribute property, another skill, and thus a partnership be formed. This, however, is an extreme case, and if this were the fact in the present instance, it would not, standing alone, in view of the denial of both parties, constitute a clear case of partnership. Here, however, the insolvent did more than find skill. He furnished the machinery and made all necessary improvements without charge, as part of his contribution, as against the use of the money furnished by the claimants.

*Meyer v. Sharpe*, 5 Taunt. 74, shews the distinction between a partner in the profits only, and a partner in the goods themselves. In our case, claimants were partners in the lumber, in the store, and in the timber lands. All assets seem to have been taken in account in order to arrive at their share of the profits.

*Smith v. Watson*, 2 B. & C. 401, shows that an agreement between a merchant and a broker, that the latter should purchase goods for the

partnership, but on the contrary that none of the insolvent's other creditors had, prior to his insolvency, any

former, and in lieu of brokerage should receive a portion of the profits and bear a proportion of the losses, does not vest in the broker any share in the property or the proceeds of it, although it may render him liable as a partner as to third persons; in which case see the remarks of the Judges on the fact that one party (who by the judgment was declared to be a secret partner) allowed the other to appear sole owner of the property, while he himself had the disposition of the proceeds with the consent of the true owner. The concluding remarks of Mr. Justice Best, are worthy of notice as bearing on this case.

And, here, did not Peckham & Hoag take possession of the lumber as it was manufactured and retain the proceeds? Did they not assume sole control of the books? Did they not buy lands (for the purpose of the business) in the name of Peckham & Randolph, and take conveyances to Peckham alone after it was paid for out of the proceeds of the business?

3. A community of power in the management of the business engaged in. This power was certainly possessed by the claimants. They appear to have exercised control over the way the books were kept; they had power to stop the business by refusing to accept drafts; and this they no doubt would have exercised, did they not receive, before the maturity of each draft, consignments of lumber, the proceeds of the sales of which were sufficient to retire these drafts; for, as one of them said, they did not expect to be called on any more for money, but merely to lend their name. Their consent had to be obtained for the store business to be carried on, and for the purchase of timber lands, from which supplies could be drawn.

Previous to the last case of *Cox v. Hickman*, 8 H. L. Ca. 268, there could have been no doubt whatever that a partnership really existed between those parties under the authority of the old cases of *Grace v. Smith*, *Waugh v. Carver, &c.* On examining the principles to be deduced from *Cox v. Hickman*, I must say I do not feel as confident in the opinion I formed of this case, as I did at first. In commenting on the case just cited, Mr. Lindley says, at p. 44: "In fact the strong tendency of the above decisions [*Cox v. Hickman*, *Mollwe, March & Co. v. Court of Wards*, L. R. 4 P. C. 419; *Bullen v. Sharpe*, L. R. 1 C. P. 86, *Holme v. Hammond*, L. R. 7 Ex. 218,] is to establish the doctrine than no person who does not hold himself out as a partner, is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners, *inter se*; and it is perhaps not going too far to say that this is now the law." As to this, I may remark, 1. Persons may hold themselves out by their acts to be partners as well as by their words; and 2. This is not exactly a case where a liability to third persons is sought to be established. Though it might perhaps be a not unreasonable argument that, in a case of partnership or no partnership, the same rule ought to be applied, no matter what the result may be.

It having been intimated that whatever way this case is decided by me, an appeal will be made by the unsuccessful party to a higher court, I might perhaps have been justified in giving a *pro formâ* judgment without entering at any length into the matter, in the same way as if, at *nisi prius*, a verdict should be formally entered for either party, leaving the whole matter to be argued in term. I have, however, considered it my duty to express in this way some of the reasons which might warrant me in arriving at the conclusion I have come to, not to allow the

ground for believing or supposing that the claimants and the insolvent were partners or in partnership.

4. That even supposing there was a partnership the claimants would be entitled to claim for the amount of the insolvent's indebtedness to them before the making of the agreement as to the joint account.

5. That this is not the insolvency of the alleged co-partnership but of Randolph alone, and therefore even supposing the alleged partnership existed, they could claim for money due by the said Randolph on partnership account.

The case was argued on 10th February, 1877. (a.)

*McCarthy*, Q.C., and *W. H. L. Gordon*, for the appellants. The learned Junior Judge of the County Court was wrong in finding that there was an agreement between Peckham & Hoag and the insolvent to share the profits and losses of the business, as the evidence expressly shews that they only shared a loss on one occasion, and that they consented to share half of that loss as a favour. A partnership was never intended, and they never held themselves out as partners. Peckham & Hoag were bound under the agreement to guarantee all the sales they made, which shews that they contemplated the relationship of principal and agent. It is true that the losses were deducted before half the net proceeds could be determined, but that would not make them partners: *Cox v. Hickman*, 8 H. L. C. 508; *Bullen v. Sharp*, L. R. 1 C. P. 86; *Holme v. Hammond*, L. R. 7 Ex. 218; *Shaw v. Galt*, 16 Ir. C. L. 377; *Smith v. Watson*, 2 B. & C. 407; *Northern R. W. Co. v. Patton*, 15 C. P. 332; *Ross v. Parkyns*, L. R. 20 Eq. 331; *Harrington v. Churchward*, 6 Jur. N. S. 576. If a partnership did exist, as the respondents

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claim now in dispute. In the face of *Cox v. Hickman*, I prefer to leave it to a higher Court to say how far the principles laid down in that case apply to the one now under adjudication, having regard to the law as established by all antecedent cases.

(a) *Present*.—BURTON, PATTERSON, and MOSS, JJ.A.; and GALT, J.



contend, we are entitled to prove our claim first, as the estate of Randolph alone is in liquidation; and we are separate creditors of the insolvents, while they are joint creditors: *Lindley on Partnership*, 1184.

*McMichael*, Q. C., for the respondents. We have in this case all the requisites of a partnership, viz., a division of the profits and losses; and under the 64th section of the Insolvent Act, 1875, Peckham & Hoag cannot prove their claim against the separate estate of Randolph until all the joint creditors have been paid. But even if they were not partners we should be paid first, as they expressly gave up their claim and agreed to be paid out of the profits: *Cox v. Hickman*, 8 H. L. C. 508. The mere fact that no partnership was intended does not prevent their being partners; and the evidence shews conclusively that there was a partnership. Peckham & Hoag consented to allow the money which the Randolph Brothers owed them to remain in the business to be carried on by the insolvent and themselves. A joint account was kept; they shared the losses in the blacksmith and grocery store, as well as the loss occasioned by the fire, and received half the profits of the business after deducting all losses. They superintended the bookkeeping and the yearly balancing. Moreover certain lands were bought in their joint names. He referred to *Bond v. Pittard*, 3 M. & W. 357; *Barry v. Nesham*, 3 C. B. 641.

*McCarthy*, Q. C., in reply. The evidence shews that Peckham & Hoag merely refrained from pressing the claim which the Randolphs owed them at the dissolution of the partnership, and there is no principle by which a creditor is postponed to others under such circumstances. The lands referred to were paid for by Randolph, and were only taken in the joint name by way of security to Peckham & Hoag. He referred to *Mollwo v. Court of Wards*, L. R. 4 P. C. 419;

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(a) *Present*.—BURTON, PATTERSON, and MOSS, JJ. A.; and GALT, J.



between that firm and Randolph, no mention being made of losses, and one would scarcely expect losses to be mentioned in an agreement for a share of net profits, unless the bargain went so far as to stipulate for contribution in the event of the transactions resulting in a loss in place of a profit. There is nothing to indicate any such stipulation in this case, or that the absence of profit or the occurrence of loss in any year would, under the agreement, affect Peckham & Hoag further than to leave them without commission for that year.

It is not contended that they had agreed to be partners, or that they considered themselves partners, and the contrary is expressly proved. There was no idea of partnership between them.

Some expressions were evoked from the parties in the course of their examination about Peckham & Hoag sharing in the losses of the business, including any losses that occurred in the grocery and blacksmithing departments of it; but the fact is evident that they shared the losses only as they affected the net profits at the end of each year, and reduced the sum payable by way or in lieu of commission; excepting of course the loss occasioned by the fire, and which they voluntarily assumed a share of.

It may be well to note that there is nothing to indicate any holding of themselves out as partners or anything else to estop them from asserting their real position, as I apprehend that the inspectors of Randolph's separate estate, who are the contestants here, may shew by any means which would be open to either a separate creditor or to any creditor of the alleged partnership, that a partnership existed.

It may be shewn, in order to establish that no debt of the character of that claimed could exist, or in order to give operation to the rule which prevents a partner, who has a demand against his co-partner, proving in respect thereof against the separate estate of the latter whilst any of the joint creditors are unpaid, because by so doing he would diminish any surplus of the separate estate, which, after satisfying the separate creditors, might be coming to th

joint creditors, and would thus be proving in competition with his own creditors.

This rule is for the benefit of the joint creditors, though the separate creditors may incidentally profit by it; and therefore it must be open to the inspectors to shew, in the interest of any class of creditors, whatever state of facts those creditors might themselves shew, as, for example, that as to them a partnership existed.

Setting aside the idea of a partnership by estoppel as not suggested by the facts in the present case, what is there to shew any partnership? The learned Judge below, who held, though with much hesitation, that a partnership was shewn, seems to have been influenced by that part of the evidence which detailed the change in the dealings of the parties, when, after Randolph and his brother ceased to be connected in the business, the arrangement was made to pay Peckham & Hoag half the profits in place of paying commission as it had before that time been paid, and which the learned Judge thought might be treated as shewing that the debt due at that time to Peckham & Hoag, and which was spoken of as of about the same amount as the debt now claimed, was left by Peckham & Hoag as capital in the business, and that they were therefore in the position of having united their capital with that of Randolph, each firm from that time taking a stipulated part in the carrying on of the business, and each sharing in the profits.

If this had been the result of the evidence there would be very conclusive grounds for holding that a partnership in fact existed, even though the parties should have agreed that they would not call themselves partners, as in *Holme v. Hammond*, L. R. 7 Exch. 218, the executors would probably have been held liable as partners, if it had appeared that the profits which they received under the articles of partnership of their testator had accrued from or in respect of capital left in the business.

I think that it would be taking a view of the evidence which it does not fairly warrant, to hold that the money due by Randolph & Brother to Peckham & Hoag was ever

intended, or treated, or understood to be left in the business as capital.

I see no reason to surmise that any change was made in the relations of the parties, or in the accounts between them, beyond that consequent on the altered mode of ascertaining the remuneration which Peckham & Hoag were to receive.

I understand the account in evidence to be a continuation of the account with Randolph & Brother, the balance due by that firm having been carried to or continued at the debit of the insolvent.

The circumstances of the purchase of the timber lands in the joint name, and the supervision exercised over the accounts, would never have been more than evidence of the existence of a contract of a partnership. They are still proper evidence ; but they have been explained. It has been made clear that no actual contract of partnership existed, and that there was no partnership unless that relation resulted from the participation of profits.

The cases of *Cox v. Hickman*, 8 H. L. C. 268, and the others which have followed that important decision, as *e. g.*, *Bullen v. Sharp*, L. R. 1 C. P. 86; *Shaw v. Galt*, 16 Ir. C. L. 357; *Holme v. Hammond*, L. R. 7 Ex. 218; *Mollwo v. Court of Wards*, L. R. 4 P. C. 419; *Ex parte Harris*, 4 DeG. J. & S. 523, and *Ross v. Parkyns*, L. R. 20 Eq. 331, have settled the law as applicable to the subject.

It is thus stated by Sir Montague Smith in giving the carefully considered judgment in the case of *Mollwo v. Court of Wards*, at p. 435 : " It appears to be now established that although a right to participate in the profits of a trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may as a presumption, not of law but of fact, be inferred ; yet whether that relation does or does not exist must depend on the real intention and contract of the parties."

The right to share the profits, even when shared to an indefinite extent, as in the present case, is under the law as thus settled only a fact in evidence, very cogent evidence it may be, but still only evidence, to be used like the other

facts proved in this case in determining whether there was or was not a partnership in fact.

Mr. Justice Lindley, in his valuable work on Partnership, after stating (p. 44) that the strong tendency of the decisions is to establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, submits, for the guidance of those who may think he has gone too far in representing the old law as completely superseded, a series of more limited propositions as at least conclusively established. One of these propositions is that, *primâ facie*, the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.

The result in the case before us is, that no partnership having been intended, or in fact created by any contract between the parties, Peckham & Hoag were not partners of Randolph and are entitled to prove their claim.

The appeal must be allowed with costs.

Moss, J. A.—It was urged by Mr. *Gordon* for the appellants, that even if a partnership were shewn to exist between Randolph and the firm of Peckham and Hoag, the latter were entitled to be admitted to prove their claim. His line of argument was, that the estate, in the liquidation of which this question is raised, is that of George Randolph alone, and not of a partnership of which he was a member: that the respondents' contention was that there was a partnership, one member of which was Randolph, and the other member the firm of Peckham & Hoag: that the respondents were opposing proof as the representatives of the creditors of the alleged partnership: that the separate creditors of Randolph were therefore entitled to priority over the respondents, who were not separate creditors; and that the appellants were really separate creditors, inasmuch as it was beyond



dispute that upon a taking of accounts between Randolph and Peckham & Hoag, the former would have been found indebted to the latter in the amount of the claim now in controversy.

There is an air of plausibility about this argument, but upon examination it is apparent that its fallacy lies in the last proposition. The argument assumes the existence of the alleged partnership. If that existed, a well settled rule stands inexorably in the way of this proof being allowed. In that case, this claim would really be for advances which a partner had made to the firm, or at the least for a demand arising out of the partnership transactions. It is settled law that such a demand cannot be proved against the separate estate until all the joint creditors are paid. The foundation of this rule is, that the surplus of the separate estate, after satisfying the separate creditors, is available to the joint creditors; and it would be unjust to permit the partner to diminish this surplus to the prejudice of those who are his creditors also. If he desires to prove against the separate estate of his copartners, his course is to pay or satisfy the joint creditors, and nothing less will suffice. So strong is the rule that it has been held that he shall not be allowed to enter a claim or prove with reservation of dividend, because this would interrupt the regular order of payment of the joint creditors. It is scarcely necessary to refer to authority in support either of this statement of the doctrine, or of its applicability to the case now in review. If any be needed, *ex parte Collinge*, 4 DeG. J. & S. 533, decided by Lord Westbury, is quite sufficient. The circumstances of that case were, that two persons, named Ashburner and Holdsmith, became partners in 1861. In the following year a dissolution was effected, and Holdsmith gave the bond of his brother and himself for £10,000, in return for which Ashburner released and transferred all his interest in the partnership, so that the joint estate became the separate estate of Holdsmith. Upon Holdsmith becoming bankrupt it was attempted to prove a claim upon this bond. The attempt failed, because there were creditors of the firm of Holdsmith and Ashburner.

The Lord Chancellor stated the doctrine to be that a partner cannot prove for a debt so as to compete with the joint creditors, who are in fact his own creditors, and that so long as there are joint debts and there is the possibility of these joint debts being brought upon the separate estate, a partner who is liable for those joint debts shall not make any claim against the separate estate, because, by possibility, he may come into competition with his own joint creditors.

There is nothing in our Insolvent Acts to militate against the recognition of this doctrine by our Courts. The 64th section of the Act of 1869, which is re-enacted in the Act of 1875, provides that "if the insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full." It may be that this is not a very felicitous expression, but it is an expression, of the rule that separate debts shall be first fully satisfied from separate estate and joint debts from joint estate; and after this either class of debts may rank upon the surplus of the other estate. It was from this rule, as enforced in English bankruptcy law, that the doctrine in question was deduced, and a similar process of reasoning must necessarily lead us to the same conclusion.

The learned counsel for the respondents was therefore quite correct in his view, that if Peckham & Hoag were as partners of Randolph liable with him for the debts contracted in carrying on the Stayner business, they or their assignee cannot be allowed to prove even against his separate estate while any of such debts remain unsatisfied. It is a corollary from this, that a state of facts which would render Peckham & Hoag liable for the debts contracted in the Stayner business would preclude proof of this claim.

It seems to me, therefore, to be quite clear that the question for adjudication is precisely the same as would be presented if persons who had advanced moneys or supplied

goods to Randolph for the Stayner business were suing Peekham & Hoag. From the carefully prepared judgment of the learned Judge in the Court below it manifestly appears that he was of that opinion.

Although the evidence is somewhat bulky, there does not seem to be much, if any, controversy between the parties as to the facts and circumstances that were actually proved. It is not disputed that the various witnesses gave their testimony with truth and candour; and their statements are free from discrepancies. The learned Judge deemed them to be credible witnesses. From their statements he drew certain inferences, upon which, and the legal consequences he thought to result, his judgment was founded.

The language of Sir R. Baggallay, J.A., in delivering the judgment of the Court of Appeal in the case of *The Glanibanta*, L. R. 1 P. D. 287, is a very recent exposition of the principles which should guide an Appellate Court in reviewing a decision upon facts by a Judge who had enjoyed the advantage of seeing the witnesses and observing their demeanour: "Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect. In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned Judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary, it would appear that his judgment in fact proceeded upon the inferences which he drew from the



evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence, as well as the evidence itself, made the subject of an elaborate and able discussion on both sides."

This language is singularly appropriate to the case now in review. The learned Judge accepted as true the evidence that there was no actual partnership entered into or intended. He expressly finds that there was no intention that the parties should stand in the relation of partners to each other, and adds: "The liability of claimants to third persons would arise then only from such acts of theirs as would go to shew what is called a *quasi* partnership."

It is convenient to observe at this point that it is not contended that one of the two modes in which a *quasi* partnership generally, if not always, arises, has any existence in this case—that is, by the person having held himself out as a partner. There is no room in the indisputable facts of the case for that contention.

The first inference which the learned Judge draws from the evidence is, that there was an agreement between these parties to share the profits and losses of the business. If this proposition be well founded in fact, it is sufficient to settle this controversy. There was then an actual, or what Mr. Justice Lindley terms a true partnership, and we are not embarrassed with any considerations applicable only to a *quasi* partnership. If the learned Judge meant that the business was carried on by Randolph and the appellants under an actual agreement for sharing profits and losses, it was unnecessary for him to place the liability of the appellants, as we have seen he does, upon the rules relating to *quasi* partnerships; or to consider, as he does, the effect of *Cox v. Hickman*, 8 H. L. C. 268, upon their position. He says that upon examining the principles to be deduced from that decision, he does not feel as confident in his opinion as he did at first. But neither in *Cox v. Hickman* nor in any of the decisions following in its train, was there an agreement to share losses. While these cases revolutionized the law as to liability con-



sequent upon sharing profits only, I do not understand them to have abrogated the rule that an agreement to share profits and losses creates a partnership between the contracting parties, whether they call themselves partners or not. The learned Judge inferred that there had been an agreement to share profits and losses, because upon losses occurring the appellants did share them in fact. I agree with my Brother Patterson that the evidence does not fairly warrant that conclusion. It is impossible to point to the slightest evidence of any agreement that the appellants should share any losses that might occur. The ordinary losses in the business were necessarily deducted from the gross returns, before the half of the net profits which formed their remuneration or commission could be ascertained. It is true that when an exceptional loss arose through the destruction by fire of a large quantity of lumber at the mill, they consented to bear half the loss; but the explanation given of this action on their part is natural and probable, and by no means points to the conclusion that there was an agreement to share losses.

The effect of their action really was to reduce the claim which they had against Randolph by half the cost price of the lumber that had been destroyed; and it was in this sense that they bore half the loss. It is established by the evidence that before the agreement, which is now alleged to constitute a partnership, Peckham & Hoag had a large claim for advances and commissions against Randolph and his brother, who had been carrying on the Stayner business in partnership. The brother being about to retire, it seems to have been thought that the appellants' prospect of receiving payment depended on some arrangement being made for Randolph continuing the business.

The arrangement made was, in terms at least, as follows: Randolph was to carry on the business at Stayner, manufacture the lumber and ship it to Peckham & Hoag at Toronto, where they were to receive it and take the necessary steps for dispatching it to market and disposing of it, and was to be at liberty to draw upon them for amounts to be named from time to time. They were to receive and account

for proceeds of all the lumber they sold. They were to guarantee all the sales they made, and account for the prices if the purchasers made default. They were to debit him with the amounts of their acceptances, and credit him with the proceeds of the lumber. He was to keep an account at Stayner of receipts and expenditures; and they were upon a statement and settlement of these mutual accounts each year, and an estimate of the net profits, to be credited with half of these profits by way of commission for their services.

It was not agreed that they should advance Randolph any money, but they were to give the use of their name for the purpose of procuring bank accommodation to an extent which they were to determine. It is obvious that by contracting the amount of this accommodation to the narrowest possible limits, they would be applying towards reduction of their claim all of his share of the net profit, which his circumstances permitted him to spare. This claim continued to be the first item in their account.

Now when the loss by fire occurred, it appeared to them upon consideration that they ought to allow him half the amount of the loss. To this they were actuated by the belief that if after such a loss they had still held over him the whole of their claim he would be ruined, and by the feeling that they were not free from blame, because they had not urged him to keep up his insurance.

Before making him the proposal to bear half the loss upon the destroyed lumber they examined his position, and arrived at the conclusion that if he went into insolvency, as he presumably would have done in preference to hopelessly struggling on beneath the burden of the whole claim, they would—to use the expression of Jessie S. Peckham—lose more than if they were to share half of the losses by fire.

Randolph did not claim that he was entitled to this by virtue of their agreement, but, on the contrary, it was sworn that he “took it as a matter of favour.” I cannot find upon this state of facts any agreement to share the losses of the business. It was not even an actual sharing of losses in

the proper sense of the term. The real import of the transaction was, that the creditors reduced their claim by an amount equal to half of that particular loss, because they believed that there was no chance of their debtor being able to pay the whole claim, and they were willing to offer him an inducement to continue the business, from which course alone there was a prospect of their ultimately receiving any substantial amount.

Besides the mill, Randolph had a store and a blacksmith's shop at Stayner, and much stress was laid on the circumstance that the losses from bad debts, &c., at these establishments, were taken into account. As I read the evidence, the dealings in the store business did not form part of or enter into the original arrangement; but it was afterwards agreed that it should be treated as a part of the business in which both parties were interested. The reason for this appears to have been that Randolph desired to supply to the men employed in lumbering articles from this store. By paying these men in goods instead of cash, he obviously diminished the cost of production of the lumber by the net profits on such goods. P. and H. were therefore entitled to their proportion of these profits, as an incident to the original arrangement. The larger these profits, the smaller the cost of the lumber. Randolph also sold to other customers than the workmen; and as he did not care to keep separate accounts, and as it would have been very difficult to distinguish with reasonable accuracy between the profits realized from sales to one class and those to the other, it was arranged that the results of the store-business should be dealt with as the lumber business. In effect, this was the same as if all sales made at the store were to be treated as made to the workmen. In no way that I can perceive did the losses incurred in this branch of the business affect the appellants, but by reducing their ultimate proportion of the profits—in other words, by diminishing their commission for their services, and their prospect of being paid their debt. But upon this branch of the case it is unnecessary to do more than refer to the judgment of my brother Patterson, with which I entirely agree.

The next proposition which the learned Judge thought established was, that there were contributions by each towards the business—by the one in the way of capital and using their best efforts in disposing of the lumber, by the other, in the way of supplying machinery, making purchases of logs, and superintending the work generally. The observations already made will have served to indicate the view which, in my judgment, should be formed with regard to the alleged contribution of capital. Peckham and Hoag did not, I think, contribute capital. They simply refrained from pressing the claim which they had against Randolph, and entered into an arrangement which they hoped would lead to its realization. But I do not perceive in the evidence the slightest trace of an understanding that the extent of that claim was to depend upon the result of the business. If it had proved wholly profitless, the appellants would have been without reward for their services, but their original claim would still have subsisted.

The learned Judge appears to intimate, although he does not expressly state, that the appellants might have been found to have an interest not merely in the profits, but in the goods sold. No doubt they had an interest, and a very material one, but it was not proprietary. I cannot perceive any ground on which it could be held that they were owners of the goods. They were factors for the sale of the lumber consigned to them, and nothing more, except indeed that they were *del credere* factors—a position somewhat repugnant to that of partnership.

If I thought these various inferences of fact which the learned Judge drew to be well founded, I should not have disagreed with his conclusion; but it remains to be considered whether upon the proper inferences and the clearly proved facts the appellants had, contrary to their intention, rendered themselves liable as partners.

The learned Judge correctly remarks that before the decision in the House of Lords of *Cox v. Hickman*, 8 H. L. C. 268, the appellants could not have disputed their liability. Their participation in the profits as such would have



brought them within the grasp of *Grace v. Smith*, 2 Wm. Bl. 998, and *Waugh v. Carver*, 2 H. Bl. 235, without permitting them to find refuge in the relaxation of this harsh doctrine in favour of persons who merely relied upon the profits as a fund for payment. It is useless now to refer to earlier decisions than *Cox v. Hickman*, 8 H. L. C. 268, for guidance in any case where a person is sought to be charged with liability to third persons as a partner, contrary to his agreement and intention, and by reason of his participation in profits or other interest in the business. That judgment was pronounced in 1860, and has been followed by a train of important decisions explaining and elucidating its principles; but so far as I am aware it is not discussed in any reported case in this Province. It forms a curious chapter in the history of English jurisprudence. The case of *Waugh v. Carver*, 2 H. Bl. 235, rested upon no solid foundation either of reasoning or authority. The reasoning was, that he who takes a share of the profits of a business takes part of the fund on which creditors rely for payment, and ought, therefore, to be responsible to creditors. The utter fallacy of this view was frequently exposed. It was pointed out that upon this principle an annuitant upon a business, or a creditor who charged exorbitant interest upon a loan ought to be responsible to creditors, for he certainly took a portion of the fund to which the creditors look. It was argued, and as is now admitted uncontrovertibly, that this decision was not law, but false political economy. It was shewn that its real support from authority was almost as slender as its foundation in reasoning. It was supposed to be supported by a decision of Lord Mansfield, in the case of *Bloxham v. Pell*, which was never fully reported, but is referred to in a note to *Grace v. Smith*, 2 Wm. Bl. 998—the only other authority on which *Waugh v. Carver*, 2 H. Bl. 235, was rested. Yet in neither of these cases was it necessary to decide that such a principle formed part of the law. Lord Mansfield enunciated no such doctrine, and while DeGrey, C. J., in *Grace v. Smith*, stated the rule in the terms just cited, he joined with the Court in refusing to disturb a verdict

which had been found for the defendant sought to be charged. Upon this slender peg—little, if at all, more than an *obiter dictum*, was hung a long chain of decisions which Mr. Lindley, writing in 1860, deemed beyond the reach of being overruled by any authority short of that of the Legislature.

But the House of Lords, in the exercise of its judicial functions, was destined to effect this change during that very year. Judge-made law, which had enjoyed nearly seventy years of surprising vitality, was finally destroyed by Judges. The vicissitudes of the case were remarkable. The responsibility of the persons charged as partners came before the Master of the Rolls in *Re Stanton Iron Co.*, 21 Beav. 164, and he expressed an opinion against their being liable. Hickman having sued two of these persons in the Common Pleas, that Court gave judgment for the plaintiff, on the ground that the defendants, although they did not take an interest in the profits of the concern as partners, did participate in the profits: *Bullen v. Sharp*, 18 C. B. 617. The case was carried to the Exchequer Chamber, and the six Judges who pronounced opinions being equally divided, the judgment of the Common Pleas remained undisturbed: 3 C. B. N. S. 523.

Upon the appeal to the House of Lords the Judges were summoned to attend, and again there was an equal division among the six who heard the arguments. The five law Lords, however, who took part in the judgment, were unanimous in reversing the decision of the Common Pleas.

It is unnecessary to refer to the special facts of the case, the principles laid down being alone important for our purpose. In the first place, it swept away the notion that a partnership was to be implied as a matter of law from participation in the profits as such, leaving that circumstance to be dealt with as cogent evidence. In the next place, it prescribed as the test of the liability of a person as a partner to creditors of a firm, the question whether he authorized the carrying on of the business on account and for the benefit of himself. Thus, participation in profits, from being a

matter of law to be dealt with by the Court, became merely a strong piece of evidence, not in itself constituting a partnership, but to be regarded in connection with the other circumstances making up the relations between the alleged partners, and liable to be rebutted or confirmed by these circumstances. These principles have been elucidated by succeeding authorities.

In *Bullen v. Sharp*, L. R. 1 C. P. 112, Blackburn, J., said: "The true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of *principal and agent* between the person taking the profits and those actually carrying on the business."

Channell, B., said: "The true test, where a person is sought to be made liable on the ground of his being a partner, is, to see whether he has constituted the other alleged partner his agent in respect of the partnership business; and that taking a part of the profits, though cogent evidence of this, is not conclusive."

Bramwell, B., described the doctrine of *Waugh v. Carver*, 2 H. Bl. 235, as one which, in his belief, had caused more injustice and mischief than any bad law in our books; and adopted the opinion I have cited as to the true test of liability for the future.

In *Holme v. Hammond*, L. R. 7 Ex. 218, an attempt was made to fix with liability the executors of a person named Fisher, who had in his lifetime been a member of a firm consisting of himself, the defendant, William Henry Fisher, and one Smith, who had died before action. At the time of his death the testator, Fisher, was entitled to a sum of money in respect of his share of the profits, and the firm also held a sum of money which they had collected on his account. The executors made no settlement with the surviving partners, but they claimed under the partnership articles the

share of profits made after the testator's death, which he would have been entitled to if living; and from time to time they required of the surviving partners an account of profits, and in balance sheets they were credited with such profits. It was argued for the plaintiff that by leaving the testator's assets in the business, and by claiming and receiving a share in the profits, they had constituted themselves partners.

It was sought to withdraw the case from the operation of *Cox v. Hickman*, 8 H. L. C. 268, and *Bullen v. Sharp*, L. R. 1 C. P. 112, by an attempted distinction between the receipt of profits up to a limited amount, *e.g.*, a debt and interest, and an unlimited receipt in respect of a share. The executors were held not to be liable.

Kelly, C. B., expressed the opinion that looking even to the older decisions upon the result of participation of profits, it will be seen that in no case has the party sought to be charged been held liable, except where a contract of copartnership has been found to have been entered into. He adds: "It is enough to say, that whenever the plaintiff has failed to establish a contract of co-partnership, the action has failed and the decision has been that the defendant was not liable."

Bramwell, B., forcibly observed, p. 232: "I have to add that I abide by all I said in *Cox v. Hickman*, 8 H. L. Cas. 268, and *Bullen v. Sharp*, L. R. 1 C. P. 86, and with unabated confidence. I need not repeat myself; but it is true in this case that if the executors are liable they are so contrary to *their* intention, the intention of the surviving partner, and of the plaintiff—in short, of everybody."

There was some discussion by the learned Judges of the proposition that the existence of partnership is to be ascertained by seeing whether each is principal and agent to and for the others, and a difference of opinion upon that point; but they all seemed to agree in the proposition that mere participation in the profits does not constitute partnership, and that before it can be determined whether that relation exists regard must be had to the circumstances under which that participation takes place.

But probably the most noteworthy case is *Mollwo v. The*



*Court of Wards*, L. R. 4 P. C. 417, from which a citation has been made by my brother Patterson. Its high authority and striking applicability to this appeal will perhaps justify a further reference. The suit was brought against a Hindoo Rajah, charging him as a partner in a firm of Watson & Co. The Rajah had, prior to August, 1863, made this firm large advances, which had not been repaid. An agreement was then made between him and the firm in consideration of the past and of any future advances, containing numerous stipulations, of which the most material to be noticed for our present purpose were in effect as follows:—

They agreed not to make any shipment without first obtaining his consent, so long as they were indebted to him; or had not removed the liabilities he had incurred for them. The shipping documents were to be at his disposal, and not to be pledged or applied in payment of the goods shipped without his consent. Goods were not to be ordered from home without his consent in writing. All remittances from home, whether in money, goods, or otherwise, were to be made over to him, and to be under his control. The proceeds of the sales of such goods were to be dealt with by him. He was to be consulted with regard to the conducting of the office business in detail, and was to be at liberty to direct a reduction or enlargement of the establishment. No moneys were to be drawn for private expenses of any member of the firm except with his permission. He was to have free access to the books, correspondence, and other papers of the firm. He was to receive a commission of 30 per cent. on all *net profits* made by the firm, while they remained liable to him, and 12 per cent. interest upon all cash advances which had been or might be thereafter made by him to the firm. After the agreement, the Rajah advanced further sums. He did not avail himself to the full or even to a very large extent of the powers conferred upon him, but he did take some part in the transaction of the business. He was credited in the books of the firm with a considerable sum in respect of profits, but this was never actually received by him.

The case was elaborately argued, the leading counsel being the present Master of the Rolls and Lord Selborne. The plaintiff's contention was, that the Rajah had become liable for the debts of the firm: firstly, because he became by the agreement, at least as regards third persons, a partner with the Watsons, although up to its date the relation between them was that of creditor and debtor; and secondly, because, if not a partner, the Watsons were his agents in carrying on the business. It was urged that whatever might have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

In pronouncing the opinion of their lordships, Sir Montague Smith thought that even on the strength of the older decisions the Rajah would not be held liable, because the case came within the thin distinction between participating in profits "as such," and receiving payment by way of salary or commission in proportion to a given *quantum* of the profits." But he did not consider it necessary to resort to such fine distinctions after the exposition of the law on the subject in *Cox v. Hickman*, 8 H. L. C. 268 and the cases following that decision. He laid it down that the judgment in that case had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. He points out the difficulty of understanding the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. He adds the important qualification that, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequence flowing from the real contract.

The best opinion I can form is, that these rules furnish a just and reasonable guide for the decision of the question

whether a person is to be liable to creditors as a partner. If he is clearly and expressly a real partner, there is no difficulty. Nor is there, if he is an ostensible partner, because it is just to prevent him from disowning the character upon the faith of which creditors may reasonably be presumed to have dealt. But where he is not expressly a partner, but participates in the profits, all the circumstances should be jealously scrutinized in order to discover the real intention, and no device should enable him to escape the liability of a real partner, if that is in truth, although not nominally, the position he has chosen to assume.

Applying these principles, their Lordships held that no partnership was constituted. The argument founded upon the large powers of control, and the extensive rights of interfering with the business, and applying its proceeds possessed by the Rajah, was not allowed to prevail. It was pointed out by the Court that he had no initiative power : that he could not direct what shipments should be made, or consignments ordered, or what should be the course of the trade ; that he could not require the Watsons to continue to trade, or even to remain in partnership. The decision was, that the true relations of the parties to each other was that of creditor and debtors.

All this applies closely to the case in hand. Peckham & Hoag were certainly not ostensible partners. There certainly was no intention or agreement between themselves and Randolph that they should be partners. There is no pretence that there was any secret agreement by which, while really intending to be partners, they should in words disavow that relationship. Their powers of control do not in their essence appear to be greater than were those of the Rajah. They did examine the accounts of the Stayner business and direct the book-keeper of Randolph as the mode of making up the annual settlement or statement. But this was quite consistent with their position as creditors. Indeed, a moment's consideration shews that this settlement necessarily involved the co-operation of both parties, because they and not Randolph kept the accounts of



sales effected. They had "no initiative power" over the Stayner business. They could not direct Randolph as to the manufacture of the lumber, nor could they require him to continue the business. He could have absolved himself from all connection with them by paying their debt and their commission, namely 50 per cent. of the profits realized up to that moment.

If he were prepared to make that payment they could not have required him to send forward to them any lumber he might have manufactured at Stayner, in order that they might enjoy the benefit of any profits derivable from its sale, as they would have had the right to do if the agreement had been for a partnership. This circumstance, coupled with their guaranteeing the payment on all sales, is very strong to shew that the only relation the parties contemplated was that of creditor and factor on the one side, debtor and principal on the other.

As to the circumstance on which so much stress was laid, that a timber lot was purchased out of the proceeds of the business, and a conveyance made to Randolph & Peckham jointly, it is unnecessary to say more than that I agree that it has been perfectly explained.

On the whole, I am of opinion that if this question were submitted to a jury their proper finding, if they gave credence to the witnesses, as the learned Judge did, would be, that it was not the real intention or agreement of the parties to become partners: that none of the circumstances proved displaced their express statement, or shewed that they ever contemplated any change in their original relation of creditors and debtor, or in their connection with the Stayner business further than in details of management incident to the alteration in the mode of receiving commission for their services.

The appeal is allowed with costs.

BURTON, J. A., and GALT, J., concurred.

*Appeal allowed.*

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## WALKER ET AL. V. HYMAN.

*Sale of goods—Representation—Estoppel.*

The plaintiffs, makers of safes at Toronto, sold a safe to one H., of London, on a written order stipulating that he was to give his notes at four and six months for the price; that his name was to be painted on the front of the safe, and that no title to the safe was to pass to H. until full payment of the price agreed upon. The plaintiff accordingly had H.'s name painted on the safe, and delivered it to him in August, 1876. In November of the same year defendant purchased the safe from H. after having first searched the office of the County Court Clerk for incumbrances against it, and believing it to belong to H.; whereupon the plaintiffs brought trover.

*Held*, reversing the judgment of the County Court, PATTERSON, J., dissenting, that the plaintiffs were not estopped from proving their ownership of the safe.

APPEAL from the County Court of the County of York.

This was an action for converting a safe of the plaintiffs' to the use of the defendant.

The plaintiffs were makers of fire-proof safes at Toronto. One Hergert, of London, gave a written order for a safe, for which he was to give his promissory notes for \$170 at four and six months. The order contained a special direction in these words: "To have my name on front, as follows, G. L. Hergert," and appended to the order, which was contained in a printed form furnished by the plaintiffs, was the following printed stipulation:—

"If notes are not forwarded to you at the expiration of twenty-five days from date of invoice, the amount shall become due at the expiration of thirty days from date of bill; and I hereby agree to accept and pay draft of amount mentioned below, and not to countermand this order. It is agreed that the title to said safe shall not pass until all the above notes are paid, or safe paid for in cash, but shall remain your property until that time; and in case of default in the payment as above specified, you are at liberty, without process of law, to take and remove said safe, and I hereby waive all claims for damages which I might sustain from such removal; and it is hereby also expressly agreed and understood that the foregoing embodies all the agreements made between us in any way, hereby waiving all claims of verbal agreements of any nature not embodied in this order."

In compliance with the order, the plaintiffs had the name G. L. Hergert put on the front of the safe, and sent it to him at London.

Hergert was a dealer in cigars. He had the safe in his place of business from August until November, and in November he sold it to the defendant. Hergert told the defendant that the safe cost him \$210 or \$220, and he offered it to the defendant for \$150, saying that he wanted to use the money in his retail business. The defendant, before closing the bargain, caused search to be made in the office of the Clerk of the County Court for incumbrances by Hergert on the safe, and found no record of any incumbrance, and he bought, evidently believing that the safe was Hergert's.

The learned Judge of the County Court, before whom the action was tried without a jury, made the following note of his finding: "I find that under the agreement produced the property in the safe did not pass and was not intended to pass until the price was fully paid by Hergert: that the defendant was a *bonâ fide* purchaser from Hergert for value; and that possession was in Hergert at the time of the sale by him to the defendant. I direct a verdict for plaintiffs for \$112.89, with leave to the defendant to move for a nonsuit or to enter a verdict for him." A rule was afterwards made absolute to enter a verdict for the defendant, and from that judgment the plaintiffs appealed.

The appellants' reasons for appeal were:—

1. The learned Judge has found that by the agreement under which the safe was delivered to Hergert the property therein did not pass, and was not intended to pass until the price for it was fully paid by him. Hergert had therefore only a right to the possession of the safe until such payment, which right he would forfeit in case he made default. Hergert having made default the appellants can maintain trover against him.

2. Hergert not having any title to the safe could convey none, but at most the right to possession, which he had. *Benjamin on Sales* Am. Ed. sec. 6. The fact that the respon-

dent bought from Hergert, without notice that the safe belonged to the appellants, cannot divest the appellants of their property therein. Neither can the fact that the respondent gave a valuable consideration, nor the fact that the safe was in Hergert's possession, and his name painted on it, (it was not alleged, as stated by the learned Judge, that the respondent was misled thereby), and that the respondent caused search to be made in the clerk's office for chattel mortgages and bills of sale. That whether Hergert "had borrowed it, or hired, or purchased it, was a matter of enquiry to be ascertained" by the respondent. See judgment of Williams, C. J., in *Forbes v. Marsh*, 15 Con. 397 and 398. And as stated by Pollock, C. B., in *Hamilton v. Bell*, 10 Ex. 545: "It is notorious that persons in possession of machinery frequently hire it. So in case of a carriage in the possession of a gentleman, it cannot be inferred from bearing his arms that it is his property." The same applies to a number of articles, and the rule must be the same in this country, as safes, machinery, pianos, and a number of articles are frequently if not generally sold under agreements similar to the one in question: *Mullett v. Green*, 8 C. & P. 382; *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomatt*, 1 C. B. 672; *Hotchkiss v. Hunt*, 49 Maine 213; *Benjamin on Sales*, 1st Am. Ed., sec. 6; *Crane v London Dock Co.*, 5 B. & S. 313; *Ex parte Powell*, *In re Matthews*, L. R. 1 Chy. Div. 501; *Deshon v. Bigelow*, 8 Gray 159. It does not appear in the evidence that respondent made any enquiries as to whose property the safe was other than the searches in the clerk's office. Even a factor in possession of goods after a revocation of his authority to sell cannot pledge the goods, although the party making the advance acted in good faith and was ignorant of the revocation: *Fuentis v. Montis*, L. R. 3 C. P. 268.

3. The Chattel Mortgage Act does not apply, as it is submitted, and the learned Judge found that at no moment did the property ever pass or vest in Hergert. See judgment of Hagarty, C. J., *Stevenson v. Rice*, 24 C. P. 250.

4. The case of *White v. Garden*, 10 C B. 927, and that class of cases, cited by the learned Judge, are not analogous to the present. These cases lay down the principle that when the owner of goods was induced to enter into a contract for sale by fraud, and it was his intention to pass both the property in and possession of the goods to the person guilty of the fraud, the contract is voidable at his election; but if prior to his election the vendee transfer the property to an innocent third party for a valuable consideration, the rights of the original owner are subordinate to such innocent purchaser: *Benjamin on Sales*, 2nd Ed. 349. In these cases the vendee had both the property in and possession of the goods at the time he sold. In the present case it is submitted Hergert had not the property in the goods. If goods were obtained from the owner by fraud, "but it was not his intention to pass the property, but merely the possession, he who obtains such possession by fraud can convey no property in them to a third person, however innocent, for no property has passed to himself from the true owner: *Benjamin on Sales*, 1st Am. Ed., sec. 433. See *Higsons v. Burton*, 26 L. J. Ex. 342, and *Hardman v. Booth*, 1. H. & C. 803, cited in *Benjamin on Sales*, 352.

The following were the respondent's reasons against the appeal:—

1. The learned Judge of the County Court, having made the rule absolute to set aside the verdict found for the appellants, and to enter a verdict for the respondent, has found as a fact that the agreement between the appellants and Hergert was merely personal, and that the appellants' lien on the safe was lost by delivery to Hergert; and the appellants, therefore, cannot maintain trover against the respondent, a *bonâ fide* purchaser for value.

2. That the appellants having painted the name of G. L. Hergert on the safe as purchaser and owner thereof, are estopped from setting up as against the respondent, a *bonâ fide* purchaser for value, that the property did not pass when delivery of the safe was made to Hergert:



*Howes v. Ball*, 7 B. & C. 481; *White v. Garden*, 10 C. B. 919.

3. If the appellants' contention was the correct one, then the case of *Deshon v. Bigelow*, 8 Gray 159, cited by the appellants' counsel, may be considered law in Ontario.

4. If the appellants' contention be correct, as stated in the reasons for the appeal, they could follow the safe through any number of *bonâ fide* purchasers and maintain trover against the last vendee, which, according to the judgment of Jarvis, C. J., in *White v. Garden*, 10 C. B. at page 927, would be a most inconvenient and absurd doctrine.

5. The present is the case of a sale with delivery of possession, and not the hiring of a chattel as in *Stevenson v. Rice*, 24 C. P. page 245; and the decision in that case is not at all in point.

The case was argued on the 8th January, 1877 (a).

*W. M. Merritt*, for the appellants. The agreement expressly provided that the property should not pass until the price was paid, and the case, therefore, does not come within the Chattel Mortgage Act: *Stevenson v. Rice*, 24 C. P. 250. *In re Mathews*, L. R. 1 Chy. Div. 501 shews that Hergert could not convey any title to the safe, as he merely had a right to the possession; and mere delivery of possession was not sufficient to enable Hergert to make a valid sale: *Loeschman v. Machin*, 2 Starkie 311; *Fuentis v. Montis*, L. R. 3 C. P. 268. It is not shewn that the defendant knew that Hergert's name was painted on the safe by the plaintiffs; so that the plaintiffs are not estopped thereby: *Marner v. Bankes* 16 W. R. 62.

*McMahon*, Q. C., for the respondent. The case of *Stevenson v. Rice* cannot be considered any authority in the appellants' favour, as it was only a hiring and the property never passed. There can be no question, however, that the property was intended to pass here, as the agreement was merely a personal license, and the property having been sold

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(a) *Present*.—BURTON, PATTERSON, MOSS, JJ. A., and GALT, J.

to a *bonâ fide* purchaser, for value, without notice, the sale is good: *Howes v. Ball*, 7 B. & C. 481; *Addison* on Contracts 839. The appellants who permitted the fraud to be perpetrated by painting Hergert's name on the safe should bear the loss: *White v. Garden*, 10 C. B. 919; *Carr v. London and North-Western R. W. Co.*, L. R. 10 C. P. 307.

February 20th, 1877 (a). BURTON, J. A.—In the case of *White v. Garden*, 10 C. B. 919 and other cases cited by Mr. MacMahon, the property as well as the possession passed, subject to the contract being avoided at the election of the vendor, and in such cases, until it is avoided, the vendee can give a perfect title to a *bonâ fide* purchaser without notice of the fraud. Here, however, by the terms of the contract, no property was to pass to Hergert until full payment of the price agreed on, and he could confer upon a third person no better title than he himself had, unless the plaintiffs have by their own conduct estopped themselves from setting up their own right to defeat the purchaser, the defendant.

What is relied upon for the purpose is, that in the order for the safe, which is the subject of the suit, Hergert requested the plaintiffs to have his name painted upon it, and although the property was not to pass until full payment of the price, it was delivered to Hergert with his name painted upon it as if he were the absolute owner.

The learned Judge finds that there was no evidence, nor was it pretended at the trial, that the defendant was deceived by Hergert's name being upon the safe.

It was urged that this case came within the rule that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, the person so conducting himself shall be afterwards estopped from denying it; but, with some doubt and hesitation, I have been unable to convince myself that the case comes within that rule.

I quite agree that any person knowing that the name had been painted upon the safe by the plaintiffs themselves, or with their consent and approval, might reasonably infer that the plaintiffs had no claim upon it, and on such a state of facts appearing, they would as to that party be estopped from setting up a title to it; but a declaration made to one man can rarely operate as an estoppel in favour of another, because it would generally be unjust to carry the responsibility arising from a statement further than the person to whom it is addressed. For instance, if an intending purchaser had written to the plaintiffs inquiring if they had any claim, and they, willing for some purpose or other at that moment to waive their claim, were to admit that they had none, although they would undoubtedly be estopped from setting up a title to the property as against the party making the inquiry, that admission could not be relied upon by a stranger, who purchased without any knowledge of such admission at the time of his purchase.

I entirely agree that a declaration may be so general in its terms and made under such circumstances as to indicate that it was intended to reach and influence the community at large, and in such cases the estoppel will be extended to every one who may be shewn to have acted upon or been governed by it; but even in such a case some evidence would have to be given from which a jury might infer that it came to the knowledge of the party and influenced him: See *Wheelton v. Hardisty*, 8 E. & B. 259. But I shall presently endeavour to shew that what was done here was not equivalent to such a general declaration or admission, and that it does not come within the principle of any of the decided cases.

In *Swan v. North British Australasian Co.*, 2 H. & C. 188, Cockburn, C. J., says: "To bring a case within the principle established by the decisions in *Pickard v. Sears* and *Freeman v. Cooke*, it is in my opinion essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss

has arisen to the other party, or his position has been altered."

And in the same case Blackburn, J., says: "I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Freeman v. Cooke*. It is pointed out by Parke B., in the course of the argument in that case, that in the majority of cases in which an estoppel exists, the party must have induced the other so to alter his position that the former would be responsible to him in an action for it; and he had before pointed out that 'negligence' to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty of it.' And this," adds the learned Judge, "I apprehend, is a true and sound principle."

A similar test is suggested in some of the American decisions, where it is said: "No liability will result in general from a representation which, though erroneous, is free from conscious falsehood or fraud, and it is difficult to believe that where the injury is not such that an action will lie at law, or compensation be awarded in equity, there can be an estoppel.

It was suggested by Parke, B., in *Freeman v. Cooke*, 2 Ex. 654, that one way to consider whether or not the facts amount to a defence, is to see whether the facts, if embodied in a plea, would make a good plea by way of estoppel.

How would the facts be stated in pleading?

It would not, I assume, be sufficient to allege that the plaintiffs painted the name of Hergert on the safe, and thereby enabled him to appear as the true owner, and that the defendant believing him to be such owner purchased; but the plea would have to state that the defendant purchased on a representation made by the plaintiffs that Hergert was the true owner, and that they meant and intended that representation to be acted upon; or that they so conducted them-



selves as to lead the defendant to believe that they intended so to represent things, and he acted accordingly on the faith of such representation.

Blackburn, J., in giving judgment in the Exchequer Chamber in *Swan v. North British Australasian Co.*, 2 H. & C., at p. 182, says: "What I consider the fallacy of my brother Wilde's judgment is this: he lays down the rule in general terms 'that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that that state of facts did not exist.' This, he adds, "is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy."

In all the reported decisions it will, I think, be found that in order to bring a case within the principles laid down in *Freeman v. Cooke*, 2 Ex. 654, two things must concur: the party must so conduct himself that a reasonable man would consider it in the light of a representation, and believe that it was meant that he should act upon it; and the party for or to whom it was made must have acted on it as true.

Here there is no pretence for saying that the defendant knew that the plaintiffs had any part in painting the name upon the safe, and therefore as to him it could not be treated as a representation, nor was he influenced by it. The painting of the name on the safe was a perfectly innocent act in itself, and obtained significance only from the circumstance of its being done by the plaintiffs; if not known to the

defendant it was no representation, which is the gist of the defence.

In *Freeman v. Cooke*, 2 Ex. 654, the defendant in the execution was held not to be precluded from proving that the goods were his own, notwithstanding a representation made by him to the sheriff that they were the property of his brother, although the sheriff seized and sold them as the goods of the brother, because the circumstances of the case, taken as a whole, were such as to shew that the representation was not meant to bring about the sale, and that the sale was not the result of the misrepresentation.

In *Gregg v. Wells*, 10 A. & E. 90, the real owner of the fittings of a public house leased them to a third party, and stood by when an agreement was made between such third party and Messrs. Elliott, the landlords of the house, under which the third party treated them as his own and gave a lien to the landlords upon them. Subsequently the third party sold them as his own, without the owner's knowledge, and the purchaser applied to Messrs. Elliott to ascertain the title, and being informed by them that the third party was the owner, the plaintiff, the real owner, was held bound by their representations, having by his own conduct led them to believe that the other was owner; and the representation, therefore, was in substance his.

In *Re Bahia and San Francisco R. W. Co.*, L. R. 3 Q. B. 585, the company were held liable to make good to the claimants certain shares formerly standing in the name of a Miss Tarlten, but for which the company had issued certificates to other parties under a forged power of attorney, striking the real owner's name out of the register. The Court there held that a share certificate *was a declaration by the company to all the world* that the person in whose name it is made out, and to whom it is given, is a shareholder in the company, and it is given by the company *with the intention* that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. It was shewn there that the claimants acted *bonâ fide* and paid their money, taking a transfer of the shares, to which the

transferors, as subsequently appeared, had no title ; but the claimants in good faith held the certificate of the company, and it was held that it came within the principle of the above cases—that if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

I am of opinion that what took place here did not amount to a representation, either to the defendant or the public generally, upon which he or they might be expected to act, and that the defendant did not act in reliance on it ; and that the plaintiffs are not estopped from shewing the real facts.

Since writing the foregoing, Mr. MacMahon has furnished two additional authorities which do not in my judgment militate against the view which I have taken. The case of *Ramazotti v. Bowring*, 7 C. B., N. S. 851, and *Carr v. The London and North Western R. W. Co.*, L. R. 10 C. P. 307.

In the former of these a person who represented himself to be the proprietor of a business carried on under the name of “The Continental Wine Company” induced the defendants to receive from him certain wines in part satisfaction of a debt previously contracted by him with them. He was in truth only a clerk of the plaintiff, who was the real proprietor, but there was nothing to indicate this. He was the apparent owner, and the plaintiff, who was the real owner, was present in the counting house and aware that he was disposing of the property in the ordinary course of such a business. The action was in assumpsit for the price of the goods by the plaintiff, and all the Court held was, that if he chose to adopt the contract made with his agent he would have to do so subject to any equitable right of the defendant existing against the agent. But it was suggested there that the act of delivering the goods in payment of his own debt was an excess of authority on the part of the agent, and had the principal brought trover the question would then have arisen, whether by standing by, allowing the parties to deal with

him as owner, and goods to be from time to time delivered to the purchasers without interposing, he was not estopped. He intended that persons should deal with the clerk as if he were the owner, and was aware of the sale and delivery of goods from day to day, and having by his conduct induced a belief in others that the clerk had authority to dispose of them, he was precluded from denying that he had such authority in any case where a purchaser had been induced to act upon that *quasi* representation, which was the proximate cause of the injury.

The proposition in Mr. Justice Brett's judgment in the latter case, to which we are referred, viz., "If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist," is no doubt correct; but this case is not within it. According to the judgment of Mr. Justice Blackburn already quoted, the negligence must be the neglect of some duty that is owing to the person led into that belief, not merely neglect of what would be prudent in respect of the party himself; and, as before remarked, the defendant is not shewn to have relied on the act or to have purchased in consequence of it. He purchased in consequence of the safe being in the possession of Hergert, and because he found no encumbrance registered against it.

I should have been pleased to be able to come to a different conclusion, as it is no doubt a hardship upon the defendant, but in my opinion the remedy must be sought from the Legislature if such a course of dealing is deemed to be against public policy.

I arrive therefore at the conclusion that the appeal should be allowed with costs, and the rule to set aside the verdict discharged with costs.



PATTERSON, J. A.—The learned Judge of the County Court delivered a well considered judgment, which proceeded upon grounds which will appear from the following extract from it: “After careful consideration I have come to the conclusion that the agreement in question is a personal one only as between the plaintiffs and Hergert, and that whatever rights in the chattel they had, they lost when it passed into the defendant’s possession. I am led to this opinion chiefly on the grounds that to hold the contrary would be against public policy, and would open a wide door to injustice and fraud. The plaintiffs had an Act ready to their hands by which they could have protected themselves, and they have refrained from using it, and have by their conduct enabled their bargainee to commit a fraud upon the defendant. The latter did all he reasonably could to satisfy himself of Hergert’s title. He finds the latter in possession, his name painted on the safe (the plaintiffs’ own act), and nothing registered against it in the proper office. These were all badges of ownership.”

I agree with the learned Judge in the conclusion at which he arrives, and in the grounds on which he founds his opinion, except those which he bases on the Chattel Mortgage Act. There is much force and good sense in the remarks which he makes in the course of his judgment on the impolicy of allowing property to be in the possession and apparent ownership of one, while it really belongs to another, without requiring some record of the title for the security of persons dealing with the ostensible owner, and on the facility thus afforded for the commission of frauds. That is an evil which formerly existed to a greater extent. The Legislature interposed by providing that, when the ownership was changed without a change of possession, a public record of the transaction should be kept. This was a wholesome and beneficial amendment of the law. It was not, however, intended to embrace cases like the present, where a change of possession takes place without a change of ownership, and any such extension, however desirable it may seem, must be the work of parliamentary and not of judicial legislation.

I am not able to read the contract in any sense that will justify me in holding that as between the plaintiffs and Hergert the property ever passed to Hergert. The safe was to remain the property of the plaintiffs. The title was not to pass to Hergert until he paid for it; and he did not pay for it.

But though, as between those two, the property was the plaintiffs', the latter may by their conduct have precluded themselves from asserting their ownership against a purchaser in good faith from Hergert, or from denying that the actual and apparent ownership coincided.

In my opinion that is the true position of this case; and as there is unfortunately some difference of opinion amongst the members of the Court upon the application of the doctrines of estoppel to the facts of this case, it will be proper for me to explain the grounds on which my opinion rests.

The enquiry if the plaintiffs are estopped by their conduct makes it necessary to apprehend distinctly what is the conduct, and what are the acts of the plaintiffs, which are relied on as having that effect.

I do not contend that it is sufficient merely to say they enabled Hergert to hold himself out as the owner of the safe, because that might be done by simply allowing him to have possession of it either on hiring or loan, and without any idea that he would represent or that any one should suppose that he was the owner. The very pretence of ownership on his part would be in that case a fraud on the real owner, and an act which he neither authorized nor contemplated; and though a purchaser might with all his caution be deceived for want of some such record as the learned Judge below desires, still the rule *caveat emptor* must govern.

This case goes much further than that. The plaintiffs not only gave possession to Hergert, but they painted Hergert's name on the article. They placed the safe in Hergert's shop, having written on it in effect "This safe belongs to Hergert." Possession is always an index of ownership, but it may be so used without the design and contrary to the wish of the real owner. These plaintiffs not only place their property in

the possession of Hergert, and give him so far the aspect of owner, but they purposely do what proclaims in words to every one who sees it that Hergert is the owner; and those who infer the ownership from the fact of possession, without having seen or having been influenced by the name which was there, they arm with conclusive evidence that the inference they drew was that which they intended to be drawn, and that when Hergert held himself out as owner he was only doing what the plaintiffs intended he should do, and repeating in another form the plaintiffs' own act.

As against the plaintiffs it may be even more strongly stated; for it was part of the bargain between them and Hergert that he should do what he did. Reading the written document, which includes the order, the stipulation as to the name, and the condition as to the title, its effect is, "Sell me a safe; the property is to be yours until I pay for it, but in the meantime it is to appear to be mine. It is really to remain yours, but every one who sees it is to be told that it is mine." The plaintiffs agree to this, and act upon it by painting on the name and delivering the safe to Hergert; and when the defendant deals with Hergert, the state of things apparent to him is just what the bargain was that it should be, and what the plaintiffs had actively and intentionally assisted in creating.

Nothing is expressly stated in the evidence, or in the finding of the Judge at the trial, to indicate whether the defendant did or did not know that Hergert's name was on the safe; but it is shewn, as I understand the evidence of the defendant's bookkeeper who conducted the transaction with Hergert, that he did not buy the safe until after he had actually seen it.

The learned Judge remarked in the course of his judgment in term, that it was not alleged that the defendant was deceived by Hergert's name being on the safe; and afterwards, in the passage I have already quoted, he speaks of the defendant finding the name on the safe, as one of the badges of ownership.

What really occurred evidently was, that Hergert offered the safe for sale as his own; that the defendant believed that it was Hergert's, all the indicia of ownership being consistent with that assertion—the possession, the name, and the absence of any registered incumbrance. What would have happened if the name had not been there? Whether in that case the defendant would have made further inquiry to ascertain whether it was really his or only lent or hired to him, or even whether Hergert would have attempted the fraud if he had not had the assistance of the plaintiffs' act, would be a matter of speculation only, and as much so if made the subject of hypothetical evidence as when used in argument without being deduced from a witness in the box. The important fact is, that the name was there, and was not only calculated to disarm suspicion, but was put there as a voucher for the truth of the false assertion which Hergert was making.

The question is, whether, under these circumstances, the plaintiffs can now be allowed to assert as against the defendant that Hergert was not authorized to deal with the safe as his own.

The rule enunciated in *Pickard v. Sears*, 6 A. & E. 469, with the modification stated in the judgment in *Freeman v. Cooke*, 2 Exch. 654, has become so well settled as to have almost acquired the character of a maxim.

It has in this form been again and again approved and acted on in the House of Lords, as by Lord Campbell, in *Cairncross v. Lorimer*, 3 Macq. 829; by Lord Cranworth, in *Jordan v. Money*, 5 H. L. Cas. 185; by Lord Chelmsford, in *Clarke v. Hart*, 6 H. L. Cas. 656; and by Lord Selborne, in *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 H. L. 352.

It has been formulated with great care and accuracy in the judgment delivered by Mr. Justice Brett, in the recent case of *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. 307, in a series of propositions, which contain the law of estoppel *in pais* as established by the leading case and the numerous subsequent decisions.



For our present purpose we shall find the statement of the rule as originally laid down, and recognized as the foundation of every decision on the subject, sufficiently full.

That rule is, that when one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. These are the words used in *Pickard v. Sears*, 6 A. & E. 474.

In *Freeman v. Cooke*, 2 Exch. 654, Parke, B., said that by the term "*wilfully*" we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly." And he further said: "In truth, in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it."

The defendant before us has very strong ground for contending that the representation did amount to a license to Hergert to represent the property as his own, and a license to all who dealt with him to deal on that footing; and that this license was given as a matter of contract between the plaintiff and Hergert. If necessary to resort to that view, I do not think there would be much difficulty found in deciding the case upon it in the defendant's favour. I do not think it necessary to discuss it now at any length, because in my opinion the general rule applies distinctly to the facts and covers the whole ground.

The defendant has beyond question been induced to change his position by his belief that the safe which Hergert sold was Hergert's to sell. The question is, did the plaintiffs by their conduct wilfully cause him to believe in that state of things? It is said that the defendant was not aware that the plaintiffs had painted the name on the safe, or had agreed with Hergert that he should hold out the article as being his property; and that, therefore, although the plaintiffs may

have done all this, and although the defendant acted in the belief induced by the appearance of things thus brought about, yet he cannot say he was induced to do so by the plaintiffs.

In *Reynell v. Lewis*, 15 M. & W. 517, Pollock, C. B., said : "This representation may be made directly to the plaintiff or made publicly, so that it may be inferred to have reached him, and may be made by words or conduct. Upon none of these propositions is there, we apprehend, the slightest doubt; and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the Judge."

The proper application to the facts before us may be illustrated by reference to some cases.

In the leading case of *Pickard v. Sears*, 6 A. & E. 469, the plaintiff was held to be estopped although he had made no representation to the defendant directly, and the defendant had bought the goods without knowing the plaintiff or knowing anything of the representation of which he afterwards received the advantage. The goods were bought by the defendant under the execution of one Hill against one Metcalfe. The plaintiff had a mortgage on the goods, and he knew of the seizure and intended sale, and had communication with Hill's attorney on the subject, without informing the attorney of his title to the goods, but he had no communication of any kind with the defendant.

In *Gregg v. Wells*, 10 A. & E. 90, the plaintiff, who owned the goodwill and fittings of a public house, and had let them to Durham, stood by while Durham and the landlord made an agreement for a lease, in which Durham agreed that the landlord should have a charge on the goods for arrears of rent which might be due when Durham should quit; but the landlord did not know the plaintiff except as the friend of a former tenant, whose rent he had on that occasion paid, and did not know of his having any connection with Durham. Durham afterwards, being in possession and having the apparent ownership, sold the

goods to the defendant, whom he referred to the landlord, who told him that Durham was his tenant. The plaintiff was held to be estopped from asserting that Durham was not the owner, although he neither knew the plaintiff nor was told anything of him, getting merely the information he did from the landlord, who did not himself know the plaintiff in connection with the goods.

Whether estoppel is after all the most accurate term to describe the effect of conduct such as comes in question in these cases, or whether the facts in such cases as *Pickard v. Sears*, 6 A. & E. 469, and *Gregg v. Wells*, 10 A. & E. 90, may look more like evidence of license to deal with the property on the basis of the ostensible state of things, those cases equally apply as authorities in the case before us; both decisions being put by Lord Denman upon the ground of the rule he enunciated; they are good examples of the application of the rule to representations made in fact, but not communicated to the party whose position is changed by acting in the belief that things are in reality as so represented.

*Miles v. Furber*, L. R., 8 Q. B. 77, was an action against the bailiffs who had executed on behalf of an incorporated company a distress warrant, under which they had seized goods of the plaintiff deposited with the tenant as warehouseman. The case was decided on the ground that the goods were privileged from distress; but an opinion was intimated by all the Judges that the defendant company were estopped from denying that the goods were deposited with them, because the tenant was, with the permission of the company, carrying on business in the name of the company, though for his own benefit, although the plaintiff did not think he was dealing with that company and did not in fact know of its existence. He supposed he was dealing with another company which had formerly carried on the same business in the same premises, but had been dissolved several years before the transaction in question, that belief existing notwithstanding that a receipt for his goods had been given to him in the name of the defendant company, the name of the old

company and the new one being so nearly similar, that his attention had not been called to the slight difference between them.

It is further argued that these plaintiffs did not mean their representation to be acted on in the way it was acted on, viz., by Hergert selling the property, and so that element of the definition is not covered by the proof.

In my judgment this mistakes the application of the definition to the facts of this case. I understand the action intended, when intention comes in question, was that Hergert should hold it out that the property was his, or that those who drew their inference from what the plaintiffs did should infer that it was Hergert's. It is not necessary that the particular or ultimate consequence of that action should have been intended.

I am not aware of any decision or doctrine that asserts the necessity to carry the intention which is imported into Lord Denman's word "wilfully" to the ultimate action taken, unless an expression of Parke, B., in *Freeman v. Cooke*, 2 Ex. 654, with reference to the facts of that case, may seem to have that effect. In that case an execution debtor thinking that the sheriff's officer was about to seize his goods, said they belonged to his brother; and the officer then producing an execution against the brother, he contradicted his former statement and said they were his own. The action was for seizing the goods on the writ against the brother.

In deciding that the plaintiff was not estopped, Parke, B., said: "It is not found that he intended to induce the officer to seize the goods as those of Benjamin; and whatever intention he had in his first statement was done away with by an opposite statement before the seizure took place." The last part of this sentence states the true ground of the decision. It could hardly have proceeded upon the rule which the literal reading of the first clause as reported might indicate, without overruling *Pickard v. Sears*. On the other hand, the cases are numerous in which parties have been estopped when the ultimate action was neither intended nor contemplated by them. *Pickard v. Sears* and *Gregg v. Wells* are both of this class.



In the case of *Ramazotti v. Bowring*, 7 C. B., N. S. 851, which was referred to in the Court below, the plaintiff who carried on business in the name of "The Continental Wine Company" happened to be in his counting house when the defendant, who did not know that the plaintiff was connected with the business, was giving orders for goods to the plaintiff's manager, who had (unknown to the plaintiff) represented himself to the defendant as the owner of business, and had induced the defendant to take the goods in payment of his private debt. When the plaintiff afterwards sued for the goods it was held that the proper question for the jury was, whether the plaintiff so conducted himself as to enable the manager to hold himself out as the owner. There were some other facts in evidence, chiefly on the plaintiff's side, but nothing suggesting in the slightest degree that the plaintiff could have had the intention that his manager should appear to own the business, much less that he should apply the plaintiff's goods to his own use.

*Cornish v. Abington*, 4 H. & N. 549, is a strong and distinct instance of estoppel by conduct which was found by the jury to have induced the belief that the defendant was dealing with the plaintiff, and not with the plaintiff's foreman with whom the dealings in reality were, under evidence that precluded the idea of the acts or omissions having been influenced by any such intention. This case borders on the class in which the estoppel arises from negligence and not from active conduct, a class depending on the same rule, but in which the question of intention is necessarily inapplicable.

In attempting to apply to the case before us the general doctrine of estoppel, I prefer to look at decided cases, rather than without the aid of decisions, to try to bring the facts within the language which learned Judges, speaking with reference to the cases before them, or text writers not dealing with any particular case, may have used to express in general terms their understanding of the rule.

The language used may be free from any charge of inaccuracy or want of precision, and yet not be so unelastic as only to embrace such cases as may seem to have been primarily in the writer's contemplation.

I think that the cases to which I have referred shew that the rule in question, as actually interpreted in practice, covers every point in the present case; and that the plaintiffs cannot now, as against this defendant, be allowed to set up a different state of things from that which they themselves assisted to bring about, and on the faith of which the defendant acted.

Courts have often to decide as between two equally innocent persons, upon which of them the loss from the fraud of a third shall fall. The fraud of Hergert has in this case occasioned a loss which must be borne either by the plaintiffs or the defendant. But they are not equally innocent. As between them the loss falls rightfully on the plaintiffs. Although I have the misfortune to differ in opinion from my learned brethren, I have the satisfaction of feeling that what strikes me as the correct application of the principles involved, and the requirements of fair dealing between man and man, indicate the same conclusion.

I think the appeal should be dismissed, with costs.

MOSS, J. A., and GALT, J., concurred with BURTON, J. A.

*Appeal allowed, with costs.*

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## BROWN V. YATES ET AL.

*Judgment—Estoppel—Pleading.*

In an action upon the common counts for the price of certain timber, delivered under a contract, the defendants objected to the non-joinder of J. B., the plaintiff's brother, as a plaintiff, and attempted to prove that they contracted with them both, as "Brown Bros.," by an exemplification of a judgment recovered by the defendants after issue joined in this suit, but not pleaded herein, in an action against the plaintiff and his brother for the non-delivery of part of the timber in question. To that action the plaintiff pleaded that he never was a member of the firm of "Brown Bros.," and both the defendants therein (the plaintiff and his brother) pleaded a denial of delivery of part of the timber by them as alleged, and a denial of the contract. The jury found all the issues in favour of the plaintiffs.

*Held*, affirming the judgment of the County Court, that the judgment was not conclusive, as it had not been pleaded by way of estoppel *puis darrein continuance*, as it might have been.

*Held* also, that if pleaded it would not necessarily have been conclusive, for it shewed only that the two brothers were jointly liable upon this contract, and the plaintiff might have been so liable as a member of the firm by holding himself out as such. The evidence set out below tended to shew the plaintiff alone entitled to recover, and the Court, on appeal from the County Court, refused to interfere with a verdict in his favour.

THIS was an appeal from a judgment of the County Court of the county of Lambton, refusing a rule *nisi* for a nonsuit or for the entry of a verdict for the defendants, or for a new trial.

The pleadings and facts fully appear in the judgment. The following were the reasons of appeal:—

The defendants were entitled to the rule *nisi* for nonsuit or verdict for the defendants, because:—

1. There was no evidence given by the plaintiff of any contract between the plaintiff and the defendants.

2. The weight of evidence, and particularly the letters and papers filed as exhibits, shew that the timber supplied to the defendants was shipped under a contract made between the firm of "Brown Brothers," composed of the plaintiff, George Brown, and his brother Joseph Brown, and the defendants.

3. There is no evidence to shew that there ever was any contract or dealing between the plaintiff individually, or between the said firm of Brown Brothers, and the defendants, other than the contract shewn by exhibits "A" and "E." The plaintiff himself states in his evidence, "he never

shipped timber to defendants more than once." This clearly shews there never was any other contract between them.

4. The exemplification of the judgment *Yates et al. v. Brown et al.*, put in evidence by the defendants, shews that the said contract was made by the defendants with Brown Brothers, and not with the plaintiff alone, and that the plaintiff and Joseph Brown were partners in that contract.

5. There is no evidence that Jacob Foster, the defendants' inspector, had any authority to alter or rescind the said contract with Brown Brothers, or to enter into any new contract with George Brown binding on the defendants, nor does any implication of authority arise from the nature of his employment.

6. There is no evidence that the said Jacob Foster pretended to have such authority, or pretended to enter into any contract for the defendants.

7. The plaintiff had not, nor had Joseph Brown, any right to put an end to the said contract, by letter exhibit "I," at least not without the defendants' consent, and no such consent is shewn.

The learned Judge of the County Court should have granted the rule *nisi* for a new trial, because the defendant John H. Stratford, who was unable to attend at the said trial, was a most material witness for the defence, and would return from Europe in time for the next December sittings of the said Court, and give evidence thereat for the defendant.

The case was argued on the 6th January, 1877 (a).

*M. C. Cameron*, Q. C., for the appellants. The defendants contend that the contract was made with the plaintiff and his brother Joseph, and they object to the non-joinder of Joseph in this action. There can be no doubt on the evidence that the contract was made with them as a firm, and the judgment in the case of *Yates et al. v. Brown et al.* conclusively establishes that they were partners—that they contracted with the defendants as "Brown Bros."—and that they

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(a) *Present*.—BURTON, PATTERSON, MOSS, JJ. A., and GALT, J.



delivered the timber in question in part performance of that contract. It will be objected that the estoppel has not been pleaded; but there was no opportunity of pleading it, as issue had been joined in this action before the judgment was recovered. It was, however, unnecessary to set it up, as it is conclusive as evidence.

*Ferguson, Q. C.*, for the respondent. The defendants have waived the absolute estoppel, if any, created by the judgment in *Yates v. Brown*, by their omission to plead it. Nor can it be urged that they were not in a position to put it on the record, as it could have been pleaded *puis darrein continuance*. But even if it had been pleaded it would not be conclusive, as the issue in question here was not essential to the decision of that case, and there was no precise finding that Joseph was a partner, but merely that he was liable on the ground that he had held himself out as a partner: *Hitchin v. Campbell*, 2 W. Bl. 831; *Martin v. Kennedy*, 2 B. & P. 71; *Wadsworth v. Bentley*, 23 L. J. Q. B. 3; *Hunter v. Stewart*, 31 L. J. Chy. 350; *Dolphin v. Aylward*, 15 Ir. Eq. N. S. 583. The defendants accepted the timber after they had been notified by Joseph that the partnership had never been consummated, and that George would supply it, and they thereby raised an implied contract to pay him. Notwithstanding the terms of the contract, the plaintiff was entitled to recover on proving that he was the owner of the goods: *Schmaltz v. Avery*, 16 Q. B. 655; *Skinner v. Stocks*, 4 B. & A. 437; *Cothay v. Fennell*, 10 B. & C. 671.

February 20, 1877 (a). Moss, J. A., delivered the judgment of the Court.

The refusal to listen to the application for a new trial was not brought into question upon the argument before us. The reason of this, no doubt, was that the application was based upon grounds entirely within the discretion of the Court below. The ground on which the nonsuit was asked for was that no contract had been proved between the plaintiff and the defendants.

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(a) *Present*.—BURTON, PATTERSON, MOSS, JJ.A., and GALT, J.

The action is brought by George Brown upon the common count for goods sold and delivered, to recover from the defendants, Yates and Stratford, the price of a quantity of timber. The pleas are never indebted and payment. The defendants do not deny the receipt of the timber, or dispute their liability to pay the amount for which the plaintiff has obtained a verdict ; but their contention is, that the contract under which the timber was delivered was not made with the plaintiff alone, but with him and one Joseph Brown jointly. They admit their liability to these two persons, and indeed on one occasion offered their cheque, payable to the order of Brown Bros., which the plaintiff declined to accept. Their objection is thus limited to the nonjoinder of Joseph Brown as plaintiff ; and the question presented for determination is, whether there was evidence proper to be submitted to the jury of the alleged contract between the plaintiff alone and the defendants. If there was, the plaintiff cannot be nonsuited.

The notes of the evidence taken at the trial are so very concise as occasionally to border on obscurity. We do not find in the case any statement of the points raised at the trial, or any reference to the Judge's charge. But for the ground suggested in the motion paper that the verdict was contrary to the charge, we should not have been able to tell whether the case had been tried with or without a jury. From this we must assume that the Judge left the case to the jury with a charge not unfavourable to the defendants, and that the jury found in favour of the plaintiff the material facts in dispute.

It appears from the evidence that the plaintiff was the owner of a saw-mill, and that towards the end of 1873 the formation of a partnership between him and Joseph Brown was contemplated. The plaintiff and Joseph Brown both allege that no partnership was finally concluded : that the conditions to be performed by Joseph before its creation never were fulfilled : that the matter went no further than negotiations ; and that before the delivery of the timber in question these negotiations had been finally terminated. On

29th December, 1873, in anticipation of the formation of the partnership, and without the authority or knowledge of the plaintiff, as he contends, Joseph Brown signed in the name of "Brown Brothers" an offer to supply the defendants with a certain quantity of oak timber at certain prices, a portion to be delivered during the month of January, and the remainder within one month thereafter, which offer was accepted by the defendants. On January 7th, 1874, the plaintiff and Joseph Brown agreed with one William Douglas to furnish money for all timber purchased for them, consisting of white oak, white ash, and hickory. This agreement is not signed in the names of Brown Brothers, but by George and Joseph in their own names. To whatever conjecture the circumstances may lead, there is no express evidence that this agreement was made with the view of supplying the defendants. On February 2nd, 1874, Joseph Brown wrote to the defendants (using the name "Brown Brothers") as follows: "I am sorry that I have to inform you that our machinery gave out last week, and it will be the end of this week before we are able to run, and in consequence of the break will not be able to furnish truck sides, as expected. We will cut them out as soon as mill starts." The truck sides here referred to were to have been delivered during the month of January. It does not appear what reply (if any) the defendants made to this communication. So far as is shewn the condition of affairs remained unchanged until 25th of April, 1874, when Joseph Brown addressed to the defendant a somewhat confused letter, of which the following is a copy :

"The pretended partnership between Brown Brothers has never been completed, neither will be. However, the business will be carried on by my brother, and he has got a quantity of timber now at the Station. You will please send Mr. Ward, or some one else, to cull and measure as soon as you can. The balance of the contract will be finished by my brother. After great trouble and expense he has obtained the second agreement of the best and only good lot of oak left in this section of the country. Were it not for the trouble and disappointment we have had with

this lot of timber we should have had the contract filled before this. You will please give notice of your coming, so we may be able to get cars and be ready to load. What is out is of very good quality. Hereafter you will address 'George Brown, Camlachie.'

"Yours truly,

"GEORGE BROWN,

"Per JOS. BROWN."

P. S. "There will be some four or five car loads now ready."

It is apparent that while writing in the name and as the professed agent of George Brown, his own individuality comes uppermost; while his evident object is to advise the defendants that the business will be carried on by George, the literal interpretation of his language is, that it will be carried on by Joseph. Writing in George's name he describes the person who is to carry on the business as "my brother," that is, strictly speaking, himself. However, the meaning of the whole letter undoubtedly is, that George was to assume this position; and indeed it is not pretended that the defendants did not understand it in that sense. After the receipt of this letter the defendants sent a person, named Foster, up to Camlachie to cull the timber. There is a dispute as to what took place after the culler arrived. The plaintiff's witnesses assert that the plaintiff distinctly told Foster not to take, or even to measure, the timber, except as plaintiff's, and that it must be shipped in the name of George Brown. This Foster denies; and he states that he gave the plaintiff a copy of a memorandum of measurement, in which the timber is described as belonging to Brown Brothers, which in turn is denied by the plaintiff and contradicted by his witnesses. The plaintiff swore: "When the culler came up I told him how the thing stood, and if they chose to take it at the same prices and deal with me, he could take it, but if not, not to put his rule on it." We must take it that the jury accepted the plaintiff's version of what occurred. The plaintiff rendered the defendants an account for this timber in his own name, and not that of Brown Brothers.



The defendants' book-keeper deposed that "the culler's instructions were to accept from "Brown Brothers." The plaintiff swore that he did not tell Douglas that he and his brother were in partnership, but that what he told him was that they were going into partnership. Douglas, although called, did not contradict the plaintiff.

The defendants put in evidence the exemplification of a judgment in the Court of Common Pleas recovered by them against the plaintiff and Joseph Brown jointly. The declaration in that case charged that the defendants, under the name and firm of Brown Brothers, made the agreement to which reference has already been made; that they had delivered part of the timber as provided by the said agreement, but had failed to deliver the residue, by which the plaintiffs had sustained special damage through loss of the profits which they would have made upon a contract for re-sale. The pleas were by the defendants jointly, (a) a denial of the alleged agreement, and (b) a denial of the alleged delivery of part of the timber; and by the defendant George Brown himself, that he never was a member of the firm of Brown Brothers, and did not promise or agree under that name or style; on which pleas issue was joined. The *postea* is, that the jury found all the issues joined in favour of the plaintiffs. The action in which this judgment was recovered was commenced on the 18th of January, 1875. The plaintiff had previously brought the present action, namely, on 5th August, 1874.

This is all the evidence that appears to be in the least degree material, and in order to succeed on this appeal the present defendants must demonstrate that there was nothing to be left to the jury on which they could find the existence of a contract between the plaintiff and the defendants.

*Mr. Cameron* argued strongly for the defendants that this question was concluded by the judgment in the Common Pleas, which he claimed to be an estoppel. His contention was that it established incontrovertibly that the plaintiff and Joseph Brown were in partnership as Brown Brothers, that they contracted with the defendants as a firm, and that in part

performance of that contract *they* had delivered to the defendants the timber in question. To the objection that the estoppel had not been pleaded, and was therefore waived, he made the twofold answer, that there had not been an opportunity of pleading it, and that at any rate it was unnecessary so to set it up, because it was conclusive as evidence. The argument of want of opportunity was based upon the fact that the defendants had pleaded, and issue had been joined in this action, before the recovery of the judgment now relied upon. This does not appear to meet the point, for we perceive no reason why it should not have been pleaded *puis darrein continuance*. Is, then, the judgment available as an estoppel, although not set up on the record?

We apprehend that the rule is now too well established to be disturbed, that a judgment containing the other elements of an estoppel is conclusive, if pleaded where there is an opportunity of pleading it; that where the frame of the pleadings does not afford any such opportunity, it is conclusive as evidence; but that where the party claiming its benefit has not chosen to plead it, although there was an opportunity, he is deemed to have waived the absolute estoppel, and to leave the judgment as evidence only for the jury. The learned author of the *Leading Cases*, in his note to the *Duchess of Kingston's Case*, after a review of the decisions, submits that the rule is that the judgment is "conclusive as a plea when there is an opportunity of pleading it, but that where there is no such opportunity, then it is conclusive as evidence." This rule has been subjected to some criticism on the ground that if any effect were to be given to the failure to plead, the consistent course would be to exclude evidence of it altogether. Whatever logical force there may be in this objection to the rule, it seems to be established by a long and consistent series of authorities. Before Mr. Smith formulated the doctrine, it had been substantially adopted in *Treviban v. Lawrence*, 2 Ld. Raym. 1048; and *Magrath v. Hardy*, 4 Bing. N. C. 782; in which latter case it was held that by reason of the defendant's omission to plead the estoppel, as he might have done, the jury were not bound by it. In Lord

*Feversham v. Emerson*, 11 Ex. 390, Mr. Baron Parke remarked: "The rule is established by a series of cases, that if a party means to insist on an estoppel he must plead it"; and again: "It is perfectly well settled law, and does not now admit of the least question, because there are no less than seven or eight cases upon the subject, that if a party does not take the first opportunity which the pleadings afford him of relying on an estoppel, he leaves the matter at large, and it is competent for the jury to determine upon the evidence, without regard to strict law." In *Young v. Raincock*, 7 C. B. 337, Coltman, J., in delivering the judgment of the Court, observed, that the defendant had not taken the advantage of pleading the estoppel, and that he had thus referred the question as a matter of fact to the jury, who were not bound by the estoppel, but might (in a foot note it is added "and must,") find the truth of the fact according to the evidence. In *Matthew v. Osborne*, 13 C. B. 919, it was held that a judgment was not conclusive, because it had not been pleaded by way of estoppel. In *Wilkinson v. Kirby*, 15 C. B. 439, Maule, J., said, "Where a man has an opportunity of pleading the estoppel and does not plead it, he is bound;" and counsel admitted that it was so when the estoppel was by matter of record or of deed. Without multiplying references, it may be sufficient to add that in the last edition of his work on Evidence, page 106, Mr. Taylor states the rule to be that a judgment is not conclusive unless it has been "expressly pleaded by way of estoppel, at least where an opportunity of so pleading it has been afforded." Under the present liberal system of allowing amendments, this rule is perhaps not likely to be often invoked. From its very nature such a plea would readily be allowed to be added at any stage of a suit, for the furtherance of justice and the maintenance of the salutary rule, which protects a person from being compelled to twice litigate the same subject matter; but even if an application had been made for this indulgence it would not have seemed proper to record it in the present, where it is conceded that the real question involved is that of costs.

This might suffice to dispose of the appeal, but it is in our judgment unnecessary to rest our decision upon so narrow a basis. We think that even where, by the operation of this rule, the judgment falls short of being a technical estoppel, it is still extremely cogent evidence, which a jury ought not on light grounds to disregard. We think it right, therefore, to consider the extent to which this judgment ought, in any aspect, and for the purpose of giving full efficacy to the salutary rule just referred to, be treated as conclusive. The gist of that action was that it was brought to recover damages for the breach of a contract which George Brown and Joseph Brown were jointly bound to perform. Nothing more was necessary to entitle the plaintiffs to a verdict than that these persons were bound by the contract made in the name of Brown Brothers, and that this contract had not been fulfilled. The defendants' pleas have already been stated. The jury found the issues in favour of the plaintiffs, which must reasonably mean that they found in favour of the plaintiffs all that was necessary to entitle them to recover. We think that this amounted to an adjudication that the defendants were jointly liable upon the contract, and that this finding should be deemed practically conclusive in the the present case. But any precise finding upon the issue which the present plaintiff somewhat incomprehensibly raised, whether or not he was in fact a member of the firm of Brown Brothers, or contracted under that designation, was quite immaterial, because he would have been equally liable if he had so conducted himself as to lead the plaintiffs to believe that there was such a firm, and that he was a member. With even less force can the present defendants appeal to the finding upon the issue raised on the plea that the Browns did not deliver a part of the timber. That plea did not deny the existence of a contract binding upon the Browns. It really averred that although the plaintiffs admitted that they had partially fulfilled their contract, that statement was incorrect. Construed literally a finding in the plaintiffs' favour upon the plea would be that the defendants had made no delivery. The more the defendants had



delivered, the less could the plaintiffs recover. These, in truth, were not material issues for the determination of the plaintiffs' rights. Nothing is better settled than that a judgment works an estoppel only as to matters essential to the decision of the case. In Co. Litt. 325 *b*, it is said:—"Every estoppel, because it concludeth a man to acknowledge the truth, must be certain to every intent, and not be taken by argument or inference." It does not appear to us that it can be pronounced with certainty what meaning should be attributed to the finding in favour of the plaintiffs with regard to the delivery of a portion of the timber. The finding most in favour of the plaintiffs for the purposes of that action was, that the defendants did not make any delivery toward the fulfilment of their contract. In the elaborate judgment of Knight Bruce in *Barrs v. Jackson*, 1 Y. & C. 585, the principle is thus enunciated: "Neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment: \* \* \* and a judgment is final only for its proper purpose and object." This statement has been since cited in cases of high authority.

Adopting that view of the judgment it seems to be clear that there was a case for the jury, and that the Judge would have erred if he had directed a nonsuit. There was evidence that the timber in fact belonged to George Brown alone: that the defendants had been so informed: that they had been notified by Joseph Brown that they must deal with George alone; and that their culler had been told in effect that if they took the timber they must account for its price to the plaintiff alone. Surely this was evidence upon which a jury might have found a contract to pay the plaintiff. It is true that it was sworn that the culler's instructions were to accept from Brown Brothers. But the plaintiff declined to deliver on behalf of the firm. He insisted that the timber, if accepted at all, must be accepted as his property.

He explained his position to the culler, and a jury might well infer that the culler communicated this explanation to his employers. Nevertheless they did not choose to return the timber, or repudiate in any manner the act of their agent in taking it. They were under no obligation to receive this timber. The original contract had long before been broken by the vendors, and the vendees were entitled to damages for its non-performance. This specific timber had never been sold by Brown Brothers to the defendants. There was a mere contract for the sale to them of a certain quantity of timber. One of the vendors says to them "The firm are not able to supply the timber, but I will furnish you with it out of my own private stock, at the contract price, but that price must be paid to me individually." The jury may not unreasonably have thought that it would not be quite consistent with justice for the vendees, who had received the goods in accordance with such proposition, or without expressing any dissent from its terms, to insist now that the other vendor had an equal right to the purchase money.

There certainly was, in our judgment, evidence for the jury, and as they have found for the plaintiff, we do not feel called upon to interfere.

The appeal is dismissed, with costs.

*Appeal dismissed.*

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## IN RE HOSKINS AND HAWKEY, INSOLVENTS.

*Insolvent Act of 1875—Claim for rent.*

Under the Insolvent Act, 1875, secs. 74-125, the assignee is bound to recognize the claim of the landlord, although he may not have distrained, as a "preferential lien" with respect to the goods on the demised premises, for whatever rent became due during the year before the assignment or attachment. The lease, dated 15th December, 1875, for ten years, made the first year's rent payable in advance, and contained a proviso that in the event of Insolvency "the term shall immediately become forfeited and void, but the next *succeeding current year's* rent shall, nevertheless, be at once due and payable." The assignment in Insolvency took place on the 22nd September, 1876.

*Held*, that the landlord was entitled to the first year's rent, as a preferred claim, but that the proviso was void as being a fraud on the Insolvent Act, and that he therefore could not prove for the second year.

THIS was an appeal by the official assignee against an order of the Judge of the County Court of the County of Ontario, allowing W. H. Thomas to rank for \$450 for one year's rent as a preferred claim, and to rank with other creditors for a second year's rent for the same amount.

The lease from Thomas to the Insolvents was dated 15th December, 1875, and was for a term of ten years from that date, at the yearly rent of \$450, the first year of which was payable in advance on the 15th December, 1875; the subsequent years were not payable in advance. The lease contained a proviso that in the event of insolvency "the then current year's rent shall immediately become due and payable, and the said term shall immediately become forfeited and void, but the *next succeeding current year's* rent shall also, nevertheless, be at once due and payable."

The assignment in insolvency was on the 22nd September 1876. On the 24th October the landlord filed his claim, but took no steps to enforce his lien. The assignee retained possession of the demised premises until the 21st November, 1876, when, having sold the insolvents' goods and chattels, he gave up the possession of the premises to the landlord.

The case was argued on the 13th February, 1877 (a).

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(a) *Present*.—PATTERSON and Moss, JJ. A.

*F. Fenton*, for the appellant. The landlord neither took possession of the goods by distress nor obtained a Judge's order allowing him a lien thereon, under section 125 of the Insolvent Act 1875; and having allowed the goods to be sold and accepted possession of the premises, he cannot now claim privilege for rent over the other creditors.

*J. R. Roaf* for the respondent. To entitle a landlord to a preferred claim for one year's rent prior to the time of insolvency, it is not necessary that the landlord should have actually levied a distress. The words "preferential lien," used in the Insolvent Act of 1875, mean that the landlord has a preferred claim for his rent to the extent of the value of the goods upon the premises at the time of the issue of the writ of attachment or of the assignment, even though he has not taken any steps to enforce his right.

The proviso that in case of insolvency "the next succeeding year's rent shall also nevertheless be at once due and payable," is an agreement between the landlord and tenant in the nature of liquidated damages for the termination of the tenancy, and the claim in this respect ought to stand as being agreed upon by the parties to the lease.

The following cases were referred to: *In re Heyden*, 29 U. C. R. 262; *In re Kennedy*, *Mason v. Higgins*, 36 U. C. R. 471; *Griffith v. Brown*, 21 C. P. 12; *Mason v. Hamilton*, 22 C. P. 190, *S. C.* 22 C. P. 420.

February 14, 1877 (a). PATTERSON, J. A.—No proceedings have been taken under sections 70, 71, or 72, of the Insolvent Act of 1875. If those sections applied under the circumstances of this case, the time for proceedings under sections 71 and 72 would not elapse for some months yet, and the term being still in existence the landlord would be entitled to his rent in full from the assignee as assignee of the term, at all events up to the end of the year now current, although it would not be payable until the end of the year, and to compensation for any damage he might sustain from the termination of the lease by the action of the creditors.

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(a) *Present*.—PATTERSON and MOSS, JJ. A.



The form of the claim filed is consistent with the continued existence of the lease, if the second year's rent were payable in advance, and it is also consistent with the assertion by the landlord of the forfeiture and the consequently accelerated debt for the second year's rent. The formal answer filed to the contestation of the claim is also consistent with either position; and in an affidavit sworn in December, 1876, the landlord says that the premises have not been surrendered, and that he has not in any way released the tenants from the lease and their covenants therein, or from the payment of the rent reserved, and that they are not so released unless by virtue of the Insolvent Act.

This is a colourless statement as regards the landlord's election to avoid the lease; but in the *vivâ voce* examination of the landlord he says "I claim rent for one year from the 15th December, 1875, to the 15th December, 1876, \$450 \* \* I also claim rent for the second year *under condition in lease*." The assignee states, in his petition on this appeal, that on the 21st November, 1876, he delivered up possession of the premises to the landlord, and that statement does not appear to be controverted. The case has been argued before me on the contention that the forfeiture clause accelerates the payment of this rent; and, indeed it is only on that contention that any claim can be advanced to rank for it. The lease being avoided, sections 71 and 72 do not apply because the lease did not "extend beyond the year current under its terms at the time of the insolvency."

The landlord clearly had a right to distrain for the first year's rent at any time after the execution of the lease. Section 125 may have the effect contended for by Mr. Fenton, of preventing his distraining the goods in the hands of the assignee, although still on the demised premises, but that section does not profess to disturb existing *rights*. It refers only to *remedies*, and provides, in effect, that the rights of claimants, in respect of goods in the hands of the assignee, must be enforced through the assignee, and that

the performance of his duty by the assignee may be compelled by the Judge upon petition.

Mr. Fenton's objection, that this proceeding is not that directed by section 125, has no force. The assignee is not charged with any failure to perform his duty. He is himself, in the discharge of his duty under section 93, raising for adjudication the question of the right of the claimant.

The right to distrain the goods on the premises is, in my opinion, what is called in section 74 the "preferential lien of the landlord for rent." I think that section recognises the right of the landlord to be paid his rent in preference to other creditors when there are goods liable to distress, and which at the time of the attachment or assignment he had a right to distrain, while it restricts that right to rent which accrued due within a year before that date. I agree with the view expressed by Mr. Justice Gwynne in *Mason v. Hamilton*, 22 C. P. 190, that the right thus recognised is analogous to that given to the landlord by the Statute 8 Anne, c. 14, s. 1.

The ultimate decision in *Mason v. Hamilton*, was that the landlord's lien was restricted to one year's rent, even when he had distrained before the insolvency but had not sold. It was not necessary to decide whether the words "preferential lien" extended to a right to distrain when no distress had been made; and, as far as I am aware, that point is yet undecided.

The Insolvent Act of 1865 first contained the provision in question. That Act, like the later ones, applied to the Province of Quebec, in which Province the lessor has, for the payment of his rent and other obligations of his lease, a privileged right upon the movable effects which are found upon the property leased: *Code Civile*, Articles 1619, 1994, 2005. The words "preferential lien" are not those which a lawyer familiar with our technical phraseology and with English law would have used to describe either the landlord's right to distrain or his interest in goods actually distrained. It is not unfair to assume that they found their way into the Statute from a Lower Canadian source,

and, therefore, to look for their intended signification, without feeling bound by their merely technical meaning.

It is difficult to imagine that the enactment was framed to meet only the case in which a landlord has happened to distrain within five days of the insolvency, and to have the goods unsold in his possession when the title passes from the tenant to the assignee. We find the statute taking away the right of distress by placing the goods *in custodia legis*, yet indicating no intention to deprive the landlord of the security he had for his rent—on the contrary, it recognizes while it limits what it calls his preferential lien.

In my opinion these words are used to indicate or include the right to distrain, and the effect of the two sections 74 and 125 is, that to the extent of whatever rent became due during the year before the assignment or attachment, the assignee is bound to recognize the claim of the landlord, as having a preference, with respect to the goods on the demised premises, over the general creditors.

Then as to the subsequent year's rent, I see no reason for refusing to hold that, as between the lessor and lessee, the amount became due and payable when the event happened which the lease declares shall produce that result, viz., the institution of the proceedings in insolvency.

But to entitle the creditor to prove it in insolvency, it is not sufficient that it is a legal debt, if it is not one for which the statute declares that the creditor can rank, or if there are valid reasons either in law or equity for excluding it. The question is, whether proof can be resisted by the assignee on behalf of the creditors on any ground, as *e. g.* by reason of there having been no debt before the insolvency, the very existence of the debt being due to the execution of the assignment; or by reason of the proviso in the lease constituting a fraud upon the Insolvent Law.

Sec. 80 declares that all debts due and payable by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this Act, and all debts then due but not then actually payable, subject to rebate of interest, shall have the right

to rank upon the estate of the Insolvent. And sec. 81, provides for the case of claims by creditors upon any contract dependent upon a condition or contingency which does not happen previous to the declaration of the first dividend.

The exact words of the proviso in this lease are: "and also, that if the term hereby granted shall be at any time seized or taken in execution or in attachment by any creditor of the said lessee (or if the said lessee shall make any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors) the then current year's rent shall immediately become due and payable, and the said term shall immediately become forfeited and void, but the next succeeding current year's rent shall also nevertheless be at once due and payable." It is argued by Mr. Roaf that this was a provision for the payment of a sum of money in the nature of liquidated damages, for the loss involved in the landlord's having to resume possession of the premises. It may be conceded that as between the parties to the lease it is an agreement of that character, and that, as I have already said, it creates a legal debt. Regarded, however, from the creditors' point of view, its effect is to provide that for what proved to be about eleven months' possession two years' rent shall be paid: that while, if the tenant continued solvent, he would not have to pay the second year's rent until he had had a second year's occupation of the premises, the effect of his insolvency is, to divert from the general creditors so much of the assets as will pay thirteen months' rent, for which no value whatever is received, either by the Insolvent or his general creditors.

The suggestion that the second year's rent is intended as compensation for the loss of the tenant receives no support from anything expressed in the lease itself. It is, on the other hand, rather discredited by the circumstance that a surrender by a tenant, who had become insolvent, imports advantage rather than loss, and by the



provision of the Insolvent Act, sections 71, 72, and 73, of which the landlord might have availed himself if so disposed, and which would have secured to him the second year's rent in full, and the right to rank as a creditor for whatever damage he could establish on the basis of section 73.

The case seems to me to fall distinctly within the principle on which Lord Redesdale decided the case *Re Murphy*, 1 Sch. & Lef. 44. At p. 49, he says "The question is, whether a person can be admitted to prove as a creditor, on the foundation of an instrument contrived for the purpose of defeating the effect of the bankrupt laws; where the only ground of the claim is an instrument executed for the purpose of giving a right against creditors, which would not exist against the bankrupt if he were solvent. All the cases in England have held this to be a fraud upon the bankrupt laws, which cannot be supported; nor really can anything where the contingency is an act of bankruptcy, and where the demand does not arise till an act of bankruptcy committed, be provable under it, because it did not exist before it."

The same principle was stated and acted upon in *Ex parte McKay*, L. R. 8 Chy. App. 643. The provision in question in that case was respecting a debt of £12,500 due to Brown & Co., who, on their part, had to pay royalties to their debtor. They were to retain half the royalties, as they became payable, towards satisfaction of the debt, but if the debtor became bankrupt the whole debt was to become due, and they were to be at liberty to retain the whole of the royalties until the debt should be fully paid. James, L. J., said "If it were to be permitted that one creditor should obtain a preference in this way by some particular security, I confess I do not see why it might not be done in every case—why, in fact, every article sold to a bankrupt should not be sold under the stipulation that the price should be doubled in the event of his becoming bankrupt. It is contended that a creditor has a right to sell on these terms; but in my opinion a man is not allowed, by

stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy from that which the law provides. It appears to me that this is a clear attempt to evade the operation of the bankruptcy laws."

I observe that the learned Judge of the County Court has allowed the second year's rent, not upon any different view of the law from that upon which my judgment proceeds, but because he treats the lease as still subsisting and the rent as payable in advance. He does not mention in the short note he makes of his finding what view he took of the evidence of the landlord, which was apparently taken before his honour, that he claims the second year under the condition in the lease; and I should gather from his honour's reference to some expressions in the evidence about the parties understanding at the time of executing the lease that although the words "in advance" were struck out on the tenant's objection to them, the rent was nevertheless to be paid in advance (expressions which seem to me to have referred only to the first year's rent, which was in terms made payable on 15th December, 1875 and not to any other year's rent, even the last, which, though they allowed the printed words "in advance" to remain as apparently applicable to it, they carefully removed from the operation of those words by making it payable on 15th December, 1885, a day after the end of the term) that his attention cannot have been called to the words of the lease, which leave no room for the construction that the second year's rent was payable before the end of the second year.

The order must be varied by disallowing the proof in respect of the second year's rent. There will be no costs of this appeal as between the parties. The assignee of course receives his costs out of the estate.

Moss, J. A., concurred.

*Appeal allowed as to the second year's rent,  
without costs.*

## IN RE McRAE, INSOLVENT.

*Insolvent Act of 1875—Composition and discharge—Fraudulent preference.*

Where, under the Insolvent Act of 1875, G. & M., creditors of the Insolvent, signed a deed of composition and discharge upon the assignee's giving them his note to cover certain law costs which they had incurred in endeavouring to recover the claim, and there was not a sufficient number in value of creditors signing without G. & M.,

*Held*, affirming the judgment of the County Court, that the deed was invalid, even though the act of the assignee was unauthorized by the insolvent.

THIS was an appeal by the Insolvents from an order of the junior Judge of the United Counties of Stormont, Dundas and Glengarry, refusing their application for the confirmation of a deed of composition and discharge, under the provisions of the Insolvent Act of 1875.

The insolvents had carried on business in company with the late Mr. Craig at Garden River, and a special and distinct business, in which Mr. Craig had no interest, at Glen Nevis.

A deed of composition and discharge was executed on the 9th of February, 1876, by which it was arranged that the creditors of the Glen Nevis estate should receive 50 cents on the dollar, by instalments, payable at 6, 12, and 18 months; and the creditors of the other estate 62½ cents by similar instalments, secured by endorsed promissory notes; and in consideration of such composition and security the creditors released their claims against the insolvents, and directed the assignee to reconvey the estate upon the deed being executed by a majority in number of the creditors of each of the said firms who should prove claims to the amount of \$100 and upwards, and who should represent at least three-fourths in value of all the claims of \$100 and upwards which should have been so proved.

The application for the confirmation of the deed of composition and discharge was objected to, on the following grounds: 1. That they had not put in statements on oath of their liabilities. 2. That they had not kept a proper book shewing their receipts and disbursements of cash; and, 3. That the signature of Messrs. Goldie & McCulloch, credi-

tors of the insolvents, had been procured by a fraudulent preference.

It appeared that Messrs. Goldie & McCulloch had refused to sign the deed when so requested by the insolvents, that they afterwards consented to execute it, upon being urged by the assignee, who as an inducement gave his own note to cover certain law costs which they had incurred in connection with their claim.

The assignee swore that the insolvents had authorized him to act as he did. The insolvents denied this, and swore that they did not know of his having given his note to Goldie & McCulloch until he told them that he had done so.

It was admitted that there was not a sufficient number in value of all the claims against both estates without including the claim of Goldie & McCulloch in the computation.

The learned junior Judge of the County Court held that Goldie & McCulloch had received a fraudulent preference, and refused to confirm the deed of composition and discharge.

The insolvents appealed.

The case was argued on the 9th January 1877 (a).

*Bethune*, Q.C., for the appellants. The deed of composition and discharge should have been confirmed, as the fraudulent preference was effected by the assignee without the knowledge of the insolvent. The intention of the Legislature was to punish the insolvent by the refusal of his discharge where he himself was guilty of a fraud, but not where it was committed by another. The insolvents should not be prejudiced by the unauthorized conduct of the assignee: *Re Thomas*, 15 Gr. 196. In the English cases where a deed has been held void, because a creditor was induced to sign in consideration of some advantage, it has always been on the ground that the other creditors have been influenced by seeing his signature; but that rule cannot apply here, as all the other creditors had signed before Goldie & McCulloch. Besides the creditors who signed are estopped from opposing



the confirmation, and cannot withdraw their consent. *Re Brent*, 2 Dillon's Circuit Court Rep. U.S. 129.

The Judge was wrong in refusing the discharge absolutely, as the most that he had power to do was, to refuse the discharge without prejudice to an application under the 64th section, and the order must be at least varied to that extent.

*Richards*, Q. C., with him *Whitney*, for the respondents. The Insolvent Act, 1875, permits a majority in number and three-fourths in value of the creditors to give an insolvent his discharge, but it requires the unpurchased consent of every one of them to bind the non-assenting creditors; and even although a creditor has been fraudulently induced to sign without the knowledge of the insolvent, still the discharge is void: *Deacon* on Bankruptcy, vol. i., 762. There is nothing to prevent a creditor who has signed the deed of composition and discharge from shewing that it is invalid under section 66.

The evidence shews that the insolvents knew this note had been given.

February 20th, 1877 (a). BURTON, J. A.—There were several objections raised to the confirmation, but it is only necessary, in the view which I take of the third objection, to consider it.

It was contended, and it may be, rightly contended, that in such a case as that under review it was necessary that the deed should be executed by the majority in number representing three-fourths in value of each set of creditors; but it is unnecessary to express any opinion upon that point, as assuming for the moment that the majority in number representing three-fourths in value of all the claims against both estates would render this deed effectual against non-assenting creditors, such a majority is not secured in this case unless the claim of Messrs. Goldie & McCulloch is included in the computation.

In reference to this claim the evidence established that the claimants had refused on the application of the insolvents to execute the deed, and that subsequently they consented to do so on being called upon by the assignee, and on his giving his own note for \$175 to cover the law costs which they had incurred in endeavouring to collect the claim.

Assuming for the present that this was unauthorized on the part of the insolvents, we have to consider whether a consent so obtained can be invoked so as to bind a non-assenting creditor.

It was held by the Lords Justices in *Ex parte Cowen*, L. R. 2 Ch. App. 563, under the 192nd section of the English Bankruptcy Act of 1861, that the power given by that section to a majority of creditors to bind the minority must be considered as, or in the nature of, a statutory power, the exercise of which will be binding only when it is fairly and *bonâ fide* exercised; and Lord Cairns, whilst enunciating the same principle, adds: "The majority are made the judges of the propriety of the arrangement so long as they exercise the power *bonâ fide*; but this is subject to the paramount obligation, that this power, like all other powers, must be exercised fairly, so that there may be a *bonâ fide* bargain between the creditors and the debtor. If it be found that the bargain was tainted with fraud, the arrangement will not be binding on the non-assenting creditors. If, for example, it were found there was a bargain with some of the creditors to give them some peculiar benefit, that would be a fraud. But even without any ingredient of fraud, if the creditors from motives of charity and benevolence, which might be highly honourable to them were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority."

This case was considered and approved in *Ex parte Deacon*, L. R. 4 Ch. App. 87, the same principle was held to apply under the Bankruptcy Acts in England at a time

when the consent of a certain number was required to the signing of the certificate.

In *Robson v. Calze*, 1 Doug. 228, Lord Mansfield, in delivering the judgment of the Court, remarks: "If there were creditors enough who would sign the certificate, and an enemy of the bankrupt were to give money to one of the creditors to induce him to sign, for the mere purpose of preventing the bankrupt from receiving any benefit from his certificate, this would be a fraud on the bankrupt, and should not hurt him. But the reasoning on the part of the defendant arises from not attending to a distinction, viz., that although a third person shall not be *punished* for the fraud of another, he shall not *avail* himself of it. There is no case in the law where that can be done. In the case of simony the presentation is void, though the money has been given without the privity of the presentee." Ashhurst, J., in the same case, says: "The test which the Legislature requires is, the unbiassed approbation of the creditors." And Buller, J., says: "If money is given in order to deprive the bankrupt of the effect of his certificate when there are creditors sufficient in number and value without those who are paid to sign it, the bankrupt shall not be hurt by this fraud on him; but if the necessary number and value is completed by persons who are induced to sign by money, *that*, though without the privity of the bankrupt, is a fraud on the creditors at large, and shall not have the intended effect. A certificate is a bar of all creditors whether they have signed or not, but they shall not be deprived of their remedy against the bankrupt unless it is obtained agreeably to the direction of the statute. This is no hardship on the bankrupt. The certificate would not have existed if it had not been obtained by means which the Legislature has reprobated. The bankrupt shall not derive a benefit from the acts of others which the law has declared to be illegal and void."

But even where the numbers are sufficient without reckoning those whose assent has been improperly obtained, the Court will enquire when the signatures were obtained,

and if any of the untainted signatures are subsequent to them will hold the certificate void, as the creditors who subsequently signed might have been induced to do so by seeing the signatures of the others: *Phillips v. Dicas*, 15 East 248. In *Holland v. Palmer*, 1 B. & P. 95, the certificate was held void on a similar ground.

The Court there say the bankrupt is to have the benefit, provided the genuine sense of the body of creditors appears in his favour, but if it is not the genuine sense that appears, the certificate is no longer that fair act which ought to have any effect. And one of the Judges adds, "I should not therefore agree to the case which has been put, of money paid maliciously. I should think that a certificate so obtained would be bad, but the bankrupt would be at liberty to procure another."

I am of opinion, therefore, that the deed was not signed by the requisite majority of the creditors, within the meaning of the Act of Parliament: that it must be inferred that Goldie & McCulloch did not execute the deed in consequence of their entertaining the *bond fide* belief that it was in the interest of all the creditors to do so, but from some other motive. They had in fact more than once refused to sign it, and it was only when a payment was made to them which the law declares to be illegal, and which rendered them liable to a forfeiture of treble the amount, that they became parties to it. This is now objected to by a creditor who is not estopped from taking the objection. I am prepared to hold, therefore, that the conclusion at which the learned Judge has arrived in refusing the confirmation can be sustained on this ground.

I am of opinion, therefore, that the appeal should be dismissed with costs, but that the order of the learned Judge should be varied so as to not to interfere with the right of the insolvents to apply for their discharge under the 64th section of the Act.

PATTERSON and MOSS, JJ.A., concurred.

*Appeal dismissed.*



## RE MILLER, AN INSOLVENT.

*Insolvency—Loan by wife to husband—Proof.*

A married woman, married in 1869, transferred certain shares, which formed part of her separate estate, to her husband, the insolvent, in 1871, for the purpose of being used in his business, upon a promise of repayment by him.

*Held*, reversing the decision of the County Court, that she was entitled to prove as a creditor.

Clear and convincing evidence of the *bona fides* of such a claim, and of the actual creation of the debt at the time of the alleged loan, should be given before admitting it to proof.

THIS was an appeal from a decision of the Judge of the County Court of the county of Peel, refusing to allow the wife of the insolvent to rank upon his estate for money lent by her to the insolvent, being the proceeds of forty-five shares in the Western Building Society.

It appeared that the claimant was married in 1869, and that these shares were her property before and after the marriage; and that the stock stood in her name in the books of the society. In 1871 she lent her husband the money for the purpose of being used in the business upon a promise of repayment by him. There was no time fixed for repayment, and nothing was said about interest.

The case was argued on the 8th January, 1877 (a).

*W. A. Foster*, and *J. B. Clarke* for the appellant. The judgment of the Court appealed from and the evidence establish that there was a loan by the wife to be repaid, and not a mere giving of money as a venture to be used in his business, she assuming the risk of loss. There was no reduction into possession by the husband after the marriage, of the stock standing in the wife's name. Being a chose in action it did not become vested in the husband by the marriage: *Philliskirk v. Pluckwell*, 2 M. & Sel. 393; *Nash v. Nash*, 2 Madd. 140. The receipt of dividends is not a reduction, nor an assignment of the wife's interest: *Hornsby v. Lee*, 2 Madd. 16. The law never effects a reduction:

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(a) *Present*.—BURTON, PATTERSON, and MOSS, JJ.A.

*Scrutton v. Pattillo*, L. R. 19 Eq. 396. The property being the wife's separate property, the husband had no power of disposition over it without her consent. Having loaned it to the husband, the wife is entitled to be repaid. As regards property settled to a wife's separate use, the wife may prove as a creditor against the husband's estate: *Woodward v. Woodward*, 9 Jur. N. S. 882; *Ex parte Melbourn*, L. R. 6 Chy. App. 64; *Ex parte Wells*, 2 Mont. D. & D. 504; *Ex parte Thring*, 1 Mont. & Chit. 75. There is no reason why she should not prove in respect of her statutory separate property. Equity has allowed a wife to have separate interests by agreement: *Slanning v. Style*, 3 P. Wms. 338. Equitable demands may be proved in bankruptcy: *Ex parte Williamson*, 2 Ves. Sr. 251 note a; *Ex parte Dewdney*, 15 Ves. 498. As a general rule, both in law and equity, a wife cannot contract with her husband, but under any circumstances where a wife is put in such a position that she can be regarded as a *feme sole*, the general rule ceases to have application: *Vansittart v. Vansittart*, 4 K. & J. 70, per V. C. Wood. Independently of the Married Woman's Act the wife is entitled to rank as a creditor. The disability of marriage is no greater than infancy, yet an infant may bring an action for money had and received: *Collins v. Brook*, 5 H. & N. 700; trover for goods: *Hunter v. Westbrook* 2 C. & P. 578; also for money deposited: *Corpe v. Overton*, 10 Bing. 252. A claim of an infant daughter for wages against her father's estate was allowed: *Ex parte Macklin*, 2 Ves. Sr. 675. If a married woman has a right to recover through her trustees she can do so by herself. *Taylor v. Meads*, 11 Jur. N. S. 166. There are American cases expressly in point in favour of the appellant: *Woodworth v. Sweet*, 44 Barb. 268; *McCartney v. Welch*, 44 Barb. 271; *Schaffner v. Reuter*, 37 Barb. 44. These were decided in the wife's favour, althogether irrespective of the Married Woman's Act.

*W. N. Miller* for the respondent. As the claimant was married in 1869 her right to succeed depends on Consol. Stat. U. C. ch. 73; but that statute does not make the property in question her separate estate. It merely says

she shall have, hold and enjoy all her real and personal property free from the debts and obligations of her husband, and from his control or disposition without her consent as if unmarried; but there is no power given her to dispose of it: *Balsam v. Robinson*, 19 C. P. 263; *Kraemer v. Gless*, 10 C. P. 475; *McGuire v. McGuire*, 23 C. P. 134. It is plain that this view of the statute is correct, as 35 Vict. ch. 16, sec. 2, O., expressly gives power to a married woman to dispose of certain property "without her husband's consent." The claimant's personal property, therefore, not being separate estate, she has only power to hold it free from his debts or disposition without her consent. She has not, however, insisted on her statutory right, but has allowed her husband to dispose of it, and has divested herself of the protection afforded her by the statute. It cannot be held that she made a contract with her husband to repay the money, as the husband and wife are one and not in a condition to contract. See remarks of V. C. Wood in *Vansittart v. Vansittart*, 27 L. J. Chy. 222. But admitting that she had a right to contract with her husband, the evidence shews that no contract was made. There was no writing, no time mentioned for repayment, and no interest stipulated for. Even if there was a promise to repay, the claimant should not be permitted to rank in preference to the creditors.

February 20th, 1877, PATTERSON, J.A.—The money lent by the wife to the husband, or the building society shares which were converted into or used as money, were clearly the property of the wife which, under Consol. Stat. U. C. ch. 73, she was entitled to have, hold, and enjoy, free from the husband's debts and obligations, and from his control or disposition, without her consent, in as full and ample a manner as if she were sole and unmarried, any law, usage, or custom to the contrary notwithstanding.

The finding of the learned Judge, that there was a promise or understanding that she should be repaid, is supported by the evidence, and whether or not we may feel

that there was room for a different conclusion, we cannot say that a different conclusion ought to have been arrived at.

It may be useful in this place to point out, though without special reference to the present case, that such a claim as that now advanced, to prove in competition with the general creditors for money advanced to be used in the business, should be closely investigated before being admitted to proof. Verbal promises and private understandings, and arrangements asserted after insolvency, which were not made known to persons giving credit on the apparent state of things, should be regarded with suspicion; and clear and convincing evidence of the *bona fides* of the claim, and the actual creation of a debt at the time of the alleged loan, should be rigidly required.

The law touching the wife's capacity to contract with her husband is thus stated in *Story's Equity Jurisprudence*, sec. 1373: "The wife may become a creditor of her husband by acts and contracts during marriage; and her rights, as such, will be enforced against him and his representatives. Thus, for example, if a wife should unite with her husband to pledge her estate, or otherwise to raise a sum of money out of it to pay his debts or to answer his necessities, whatever might be the mode adopted to carry that purpose into effect, the transaction would, in equity, be treated according to the true intent of the parties. She would be deemed a creditor or a surety for him (if so originally understood between them) for the sum so paid; and she would be entitled to reimbursement out of his estate, and to the like privileges as belong to other creditors."

In *Woodward v. Woodward*, 9 Jur. N. S. 882, it is thus stated by Lord Westbury: "Wisely or unwisely, this Court has firmly established the independent personality of a *feme covert* with respect to property settled to her separate use. It is a remarkable instance of legislation by judicial decision. The old common law has been entirely abrogated, and the power of the wife to contract with her husband



has been established. I do not go so far as to say that in the bare case of a sum of money, part of the income of her separate estate, being handed over by the wife to the husband, this Court would of necessity raise an assumpsit for the repayment; but it is quite clear and well settled, that if money, part of the income of her separate estate, be handed over by the wife to the husband upon a contract of loan, she may sue her husband in respect of that contract."

Numerous cases have been cited to us which have arisen since 1859, and in which the effect of our statutes respecting the property of married women has been discussed. We are not now called upon to express any opinion upon the conflicting views enunciated by the learned Judges who have taken part in the decision of those cases. They have chiefly dealt with the power of the married woman to charge or dispose of her property or to make it liable to her debts, and that has been to a considerable extent taken to depend on the similarity of the separate property under our statutes to the separate property recognized by courts of equity apart from legislative enactment. No such question arises in the present case. If it did arise it would probably involve a review of many of the decisions which have been given, and this we should not attempt except upon argument before the full Court. Whether we regard the transaction before us as a loan of money by the wife to the husband, or a disposal of the wife's property by the husband with her consent, the promise to repay was a condition on which the loan was made or the consent given, leaving only the question of the wife's capacity to contract with her husband, and to enforce the contract against her husband or his estate. This question is met by the authorities which I have quoted.

The appeal must be allowed, and the appellant permitted to prove as a creditor.

This question was one of importance, and as well because of that question as by reason of the importance of having the debt properly established before being admitted to rank against the estate, the claim was properly contested

by the assignee. The appellant will have her costs of this appeal and of the contest in the Court below as against the respondent, and he will be entitled to those costs, as well as to his own, out of the estate.

BURTON, and MOSS, J.J.A., concurred.

*Appeal allowed.*

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VICTORIA MUTUAL FIRE INSURANCE COMPANY V.  
BETHUNE ET AL.

*Interpleader—Garnishment—Equitable defence—A. J. Act, 1873.*

In certain garnishee proceedings in the Division Court of the County of Wentworth several creditors had obtained orders attaching the whole amount, \$582, found due under an award from the company to the judgment debtor for a loss by fire, and ordering payment thereof. Subsequently the Judge of the County Court of Essex, notwithstanding the opposition of the company, made a similar order to pay \$208 to another creditor, on the ground that when the summonses in the Division Court of the County of Wentworth were issued there was no attachable debt due. The company unsuccessfully applied to the Judge of the County of Wentworth to rescind his orders, and then filed a bill calling on the defendants, the different attaching creditors, to interplead.

*Held*, SPRAGGE, C., dissenting, affirming the judgment of PROUDFOOT, V.C., 23 Gr. 568, that it was not a proper case for interpleader.

Per BURTON and MOSS, J.J. A., that the bill was not sustainable, for the attaching creditors in Wentworth had obtained judgments in the Division Court against the plaintiffs, with which the Court of Chancery could not interfere.

Per BURTON and PATTERSON, J.J. A., that under the circumstances the Judge of the County Court of Essex had no power to make a summary order for payment.

Per PATTERSON, J. A.—The rights of all parties might be adjusted in the suit in the County Court of Essex, and if dissatisfied with the decision there, the plaintiffs might appeal from it.

Per PATTERSON, J. A.—*Seemle*, that the power to bring other parties before the Court under section 8 of the A. J. Act, 1873, does not apply to summary proceedings collateral to the action.

Remarks as to the effect of the A. J. Act, 1873.

APPEAL from the decision of Vice Chancellor Proudfoot, refusing the plaintiffs' application to continue the injunction, reported in 23 Grant 568. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The appellants' reasons of appeal were :

1. The Legislature of Ontario never intended by any provision in the Administration of Justice Act, 1873, 36 Vic. ch. 8, Ont., to deprive a suitor who had been proceeded against, as in this case, at law of his remedy by interpleader in the Court of Chancery, nor has that Act such effect.

2. The evidence shews that an execution has been issued from the First Division Court of the county of Wentworth, and that the plaintiffs' goods were seized. The plaintiffs could not by any application to the Judge of the County Court of the county of Essex have obtained, nor could such Judge have granted that immediate relief necessary to protect their goods from sale.

3. The Judge of the County Court of the county of Essex had no power to restrain the parties from proceeding in the First Division Court of the county of Wentworth, or to make any order in respect of proceedings pending in that Court, nor had the Judge of the County Court of the county of Wentworth, as *ex-officio* Judge of the said Division Court, any power or authority to make any order in respect of the proceedings in the County Court of the county of Essex.

4. The power given by sec. 8, 36 Vic., cap. 8, to the common law Judge is discretionary. If he does not exercise it or decline to exercise it, as in this case, a party is not to be deprived of a remedy which he had previous to the passing of that Act in the Court of Chancery.

5. Upon the allegations contained in the plaintiffs' bill of complaint and affidavits used on the motion this was a proper case for interpleader, and the order moved for should have been granted.

*Davidson v. Douglas*, 12 Grant 181; *Nelson v. Barter*, 2 H. & M. 334 *Hankey v. Vernon*, 2 Cox 12; *Jew v. Wood*, *Craig & Phillips* 185; *Meux v. Bell*, 6 Sim. 175.

The following were the respondents' reasons against the appeal, other than the respondent Abel.

The respondents, Bethune, Sutton, Scadding, Brassard,

Neveux and Neveux, Hutton, Fox, McKee, and Baby, submit that the order and judgment appealed from is right, and ought to be affirmed, for the following among other reasons:

1. That the demands against the plaintiffs had been contested by them at law and decided against them before they filed their bill, and a bill of interpleader is too late after verdict and judgment at law. *Cornish v. Tanner*, 1 Y. & J. 333; *Larabrie v. Brown*, 1 De. G. & J. 205.

2. That the bill and affidavits shew on the face of them that these respondents are clearly entitled, and where one of the parties required to interplead appears to be entitled, a bill of interpleader will not be sustained. *Bank of Montreal v. Little*, 17 Grant 313.

3. That it is an essential qualification both at law and in equity that the person seeking the right of interpleader should be in a position of complete neutrality; here, the said plaintiffs claim part of the fund. *Mitchell v. Hayne*, 2 S. & S. 63; *Bignold v. Audland*, 11 Sim. 24.

4. That the said plaintiffs had a complete remedy, if any, in the Court in which the proceedings complained of arose. *Imperial Loan and Investment Co. v. Boulton* 22 Grant 121; *Henderson v. Watson*, 23 Grant 355; *A. J. Act*, 1873, sec. 8; *Tate v. Corporation of the City of Toronto*, 3 P. R. 181.

The respondent David H. Abel submits that the order appealed from is right for the following amongst other grounds:

1. Upon the statements contained in the bill of complaint, and the affidavits, papers, and evidence used and read on the motion for injunction, it appears that this is not a proper case for interpleader.

2. The appellants, instead of coming to the Court for relief immediately upon being served with the garnishee proceedings in the County Court of Essex, chose to contest the question of their liability; and it is now too late for them, after having the question decided against them and a judgment for payment pronounced against the respondent, to come to this Court for relief upon a bill of inter-



pleader. *Cornish v. Tanner*, 1 Y. & J. 333; *Larabrie v. Brown*, 1 De. G. & J. 205; *Fuller v. Patterson*, 16 Gr. 91.

3. By setting up, in the said proceedings in the County Court of Essex, the right of the other respondents to the fund in question, and acquiescing in the right of the said Court to adjudicate upon the questions raised, the appellants have precluded themselves from obtaining the relief they now seek. By their action in the premises they ceased to hold the neutral character of stakeholders, and admitted the right of the other respondents to be paid. *Crawshay v. Thornton*, 2 M. & C. 1; *Fuller v. Patterson*, 16 Gr. 91.

4. If the appellants had consented to hold part of the fund in question for and on behalf of this respondent, they could not afterwards resist his claim for payment and require him to interplead; and by allowing a judgment in favour of this respondent to be obtained against them for a part of this fund, which is a stronger proceeding than giving a consent entitling this respondent to a judgment, the appellants have precluded themselves from calling upon this respondent to interplead. *Fuller v. Patterson*, 16 Gr. 91.

5. By applying to the Judge of the Division Court of Wentworth, after this respondent obtained his judgment against them, to set aside the garnishee orders made in favour of the other respondents, the appellants acquiesced in the validity of this respondent's judgment and consented to be bound by it, and they cannot now ask to be relieved against it.

6. The Judge of the County Court of Essex had all the facts before him, and had full power and jurisdiction to hear and determine the matter in question, and his decision is final and cannot be reviewed by the Court of Chancery in the way it is here sought to review it. It is no part of the jurisdiction of the Court of Chancery to correct the errors or mistakes of other Courts having complete jurisdiction to hear and determine the matter in dispute, unless by way of appeal from the decision complained of. *McIntosh v. McIntosh*, 18 Gr. 58.

7. It appears on the bill of complaint that the appellants claim a part of the fund in question, whereas, a party seeking relief by interpleader must claim no personal interest in the property in dispute or any part thereof. *Diplock v. Hammond*, 2 Sm. & G. 141; *Bignold v. Audland*, 11 Sim. 24; *Mitchell v. Hayne*, 2 S. & S. 63.

3. The granting or withholding of an injunction is a matter of discretion, and the decision appealed from is not appealable.

The case was argued on the 17th December, 1876 (a).

*J. A. Boyd*, Q. C., for the appellants.

*J. Crickmore*, for the respondents other than Abel.

*C. Moss*, for the respondent Abel.

The arguments fully appear in the reasons for and against the appeal.

The following additional cases were cited:—

For the appellants: *Williams v. Roberts*, 8 Hare 314; *Bush v. Bush*, 15 Gr. 431; *Arden v. Patterson*, 5 Johnson Chy. 44; *Oriental Bank v. Nicholson*, 3 Jur. N. S. 857; *Kingsford v. Swinford*, 28 L. J. Chy. 413; *Gompertz v. Pooley*, 28 L. J. Chy. 484; *McLeod v. Millar*, 12 Gr. 194; *Arnold v. Allinor*, 16 Gr. 213.

For the respondents: *McCabe v. Wragg*, 21 Gr. 97; *Demorest v. Helme*, 22 Gr. 433; *Knox v. Travers*, 23 Gr. 41; *French v. Taylor*, 23 Gr. 436; *Standly v. Perry*, 23 Gr. 507; *Moore v. Usher*, 7 Sim 383; *Burnett v. Anderson*, 1 Mer. 405; *Crabb v. Parsons*, 18 Gr. 674.

March 16th, 1877. SPRAGGE, C.—Relief was refused in the Court below, on the ground that the plaintiffs should, under the Administration of Justice Act, have pursued their remedy in the Court which had cognizance of the matter. Upon the other points raised by the defendants in the Court below, the learned Vice-Chancellor was against the defendant, so far as he expressed any opinion. Those

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(a) *Present*.—SPRAGGE, C.; BURTON, PATTERSON, and MOSS, JJ. A.

points were that the plaintiffs themselves claimed an interest in the fund: that they favoured one party more than the other, and that they disentitled themselves by delay. These points are also taken in appeal, with the further point, as put in their reasons against the appeal, "that the demands against the plaintiffs had been contested by them at law, and decided against them before they filed their bill; and a bill of interpleader is too late after a verdict and judgment at law," as amplified in argument, that an interpleader suit becomes in such case in effect an appeal from an adjudication at law. This last point, and the ground upon which relief was refused, are the only ones that present any difficulty to my mind.

I do not think that the plaintiffs claimed any interest in the fund. The fund was the amount awarded to be paid by the plaintiffs, as insurers, to Stephen P. C. Clark, who had insured with them. The subject of the action was the value of property damaged or destroyed by fire: such property being that of Clark insured by the plaintiffs. The award was under section 53 of the Mutual Fire Insurance Companies' Act of 1873, and could be of no other subject matter than the value of property damaged or destroyed. The award was that the plaintiffs should pay to Clark "for his losses occasioned by the fire the sum of \$623. The Act would have been more strictly followed if the arbitrators had simply found the sum named to be the value of the property destroyed or damaged; anything beyond that was *ultra vires*; but they have in substance found that, in awarding the sum named to be paid to the insured "for his losses occasioned by the said fire." The plaintiffs have claimed to retain \$40.43 out of the sum awarded, in respect of premium notes given by the insured as provided by the Act; and their right to retain it has not been questioned. The balance, \$582.58, is the sum that was payable by the plaintiffs to Clark; and that sum was the fund which the creditors of Clark were entitled to garnish; and of that fund no part was claimed by the plaintiffs. I do not think that there is anything in the objection that the plaintiffs

avored one party more than another. There were not, indeed, two or more parties, in the ordinary sense of the term, as all of the claimants upon the funds, claimed in the same right, *i.e.*, as creditors of Clark, and they were entitled to be paid out of the fund simply in the order in which they established their respective claims. Some of them residing in the county of Wentworth and establishing their claims in a Division Court of that county, and one other in Essex, and establishing his claim in the County Court there, can make no difference in that respect. The claims established in Wentworth exhausting the whole of the fund and being established before that in Essex, and the plaintiffs objecting that fact against the claim of the Essex Court being also established against him, was not a favoring of the Wentworth creditors, but a pure act of self-defence. Its effect, and what was done upon it, in another aspect of the case, is a different thing.

Nor do I think that the plaintiffs disentitled themselves to relief by delay in filing their bill. The County Court Judge of Essex finally disposed of the application before him (which was to rescind his order in favour of Wentworth creditors) on the 28th of July; the bill was filed on the 31st of the same month.

The strong point in defendants' case (apart from that on which Proudfoot, V. C., proceeded) is, that there was an adjudication by the County Court Judge in Essex, and that such a bill is in the nature of an appeal. The Wentworth creditors and the Essex creditors though not opposing claimants in the ordinary sense, as all are claimants upon the fund in one right, *i.e.*, as creditors of Clarke, are still practically different claimants upon the same fund, and form two classes of claimants, one in virtue of debts established in one county, the other in virtue of debts established in another. In all the cases in which relief has been denied, the plaintiff's course has been an erroneous one; he has resisted the demand of one of the claimants, and there has been a judgment or at least a verdict against him. He ought to have come earlier and,



without taking the step he has taken, or he has disentitled himself to relief by something that he has done, as in *Crawshay v. Thornton*, 2 M. & C. 1.

What have the plaintiffs done here? They were simply stakeholders and had nothing to say against the claims of creditors up to the amount of the fund in their hands. A claim came from another quarter, though also from a creditor of Clarke, still through another forum. Were the plaintiffs wrong in informing that forum in the usual way that the fund was exhausted? They did not dispute that the creditor was a creditor of Clark, but simply say that the subject matter has ceased to exist, has been disposed of by competent authority. They must either have done this, or when being served with a garnishee summons from Essex have immediately filed their bill. If they had done so they might well have expected to be told that they had needlessly rushed into Chancery. The course they took was, I think, perfectly correct. They expected no doubt that the Essex Judge would have respected the judgment of the Wentworth Judge; it was the judgment of a Court of competent jurisdiction, of the same jurisdiction as his own Court. They could have scarcely thought it possible that the Essex Judge would treat as a nullity this other judgment. He has done so, not as *ultra vires*, but that the judgment was erroneous in law—a most extraordinary assumption of authority.

It is not necessary now to say that he was wrong (though it is scarcely possible to think otherwise), but were the plaintiffs wrong in making the defence they did? It was in substance a suggestion that there was nothing to adjudicate upon. I will refer to this point more fully presently. If the judgment in Wentworth exhausted the fund, was not the order in Essex *ultra vires*? His jurisdiction to deal with the fund proceeds upon the assumption that there is a fund to be dealt with. If there had been a fund and it is gone, is it not the same as if there never had been a fund? The fund was in *quasi custodia legis*, or at least in an analogous position, it was in a course of being dealt with.

in a Court of law. Is there a cast-iron rule that after a right has been adjudicated upon, in any way, by summary proceeding or otherwise, interpleader will not lie. I question if any cases go that length.

The strongest argument on this point is, that the decree is in the nature of an appeal; but the plaintiffs raised no question before the Judge in Essex as to the right of creditor against debtor, or the right of Clarke against him, so there was no question of right to adjudicate upon.

The Judge in Essex ordered the plaintiffs to pay, so adjudged them liable, and they were liable but for an outside circumstance, that they had been adjudged to pay already. But the Judge decided that the plaintiffs were still liable.

In *Nelson v. Barter*, 2 H. & M. 334, there was a judgment. The claimants were assignees of the fund, and an attaching creditor from the Lord Mayor's Court. Case reported 12 W. R. 799, and 3 H. & M. 334, and on appeal 10 Jur. N. S. 832.

The question before the Judge in Essex was in a peculiar shape. Section 290 of the C. L. P. Act, defines the cases in which the Judge may order execution to issue. One (the one put last), is where the garnishee does not appear upon the summons. In this case he did appear. The other is where he does not dispute the debt claimed to be due from him to the judgment debtor. He did not dispute that debt; but appearing on the summons shewed cause against his being ordered to pay it to defendant; he did what is probably comprehended under the term "disputes his liability" in section 291. The primary signification of the term would be that he disputes what under section 290 he is brought before the Judge to answer against, his debt to the judgment debtor, but it may well signify also, his liability to pay that debt to the judgment creditor. Proceedings were not taken under section 291, but the Judge, although the garnishee disputed his liability in a sense in which, as I read the Act, he might properly dispute it, made an order that execution should issue, instead

of ordering that the judgment creditor should proceed against the garnishee under section 291. He should, I think, have put the judgment creditor to proceed under that section, for certainly it by no means follows that because the garnishee does not, and indeed cannot, dispute the debt due by him to the judgment debtor, he ought in law to be made liable to pay it to the judgment creditor. If the Judge had taken that course and had erred in his judgment, appeal would lie, but appeal would not lie, I believe, from an order made under section 290.

But, it is said, whether the Judge was right or wrong, is not the point. Right or wrong, there was an adjudication. If appealable, the party aggrieved should appeal; if not appealable, he has no remedy. There is an American case which bears upon this point in relation to these proceedings: *Arden v. Patterson*, 5 Johns. Chy. R. at p. 53. In that case the Chancellor, Chancellor Kent, I believe, referred to the principle adopted by the Judges of the Supreme Court, and sanctioned by the Court of Errors in *Simpson v. Hart*, 14 John, Rep. 63, in which case it was stated that decisions upon motion and summary application which do not admit of great discussion, or of being subject to a writ of error, are not final and conclusive, so as to amount to a *res judicata* and a bar to a renewed consideration of the case in another Court of concurrent jurisdiction. It had been objected in that case that the question then before the Court had been already decided by the Supreme Court upon notice, but the Chancellor held that the objection utterly failed upon the principle which I have quoted from his judgment.

I do not find that the same principle obtains in our Courts; but I do find that the maxim, *transit in rem judicatam*, is not without exception in its application. A judgment may be impeached on the ground that it is against natural justice (as indeed I suggested at the argument). In *Wildes v. Russell*, L. R. 1 C. P. 745, Mr. Justice Byles uses this language: "It may be conceded that, if a judgment has been obtained by fraud, or is contrary to

*natural justice*, it may be impeached in a collateral proceeding." The case indeed was not decided upon that ground, but I think direct authority will be found for the proposition. It scarcely needs authority for the further proposition, that a man cannot be compelled to pay a second time a sum of money which he has once paid under the sanction of a Court of competent jurisdiction. In *Allen v. Dundas*, 3 T. R. 125, a debtor to an estate had paid his debt to an executor who had obtained probate of a forged will. The will and probate were afterwards declared null and void and administration granted to the plaintiff in the case. It was held that the probate was a judicial act and protected the debtor in his payment, and Mr. Justice Grose, summarizing his judgment, said: "The law, which is founded on wise and sound principles, will never compel any person to pay a sum of money which he has once paid under the sanction of a Court of competent jurisdiction." This language is quoted and reiterated in the judgment given by the Court of Exchequer Chambers in *Wood v. Dunn*, L. R. 2 Q. B. 80. A judicial order compelling a man to do this would be against the wise and sound principles of the law, and would be within the category of judgments referred to by Mr. Justice Byles as judgments contrary to natural justice. It can make no difference in principle that in this case the debtor has not already paid. If the order made in *Wentworth* stand, and the order made in *Essex* also stand, the inevitable consequence is that the debtor being compelled by the order made in *Wentworth* prior to that made in *Essex*, to pay the *Wentworth* creditors, will by the order made in *Essex* be compelled to pay *pro tanto* his debt twice over.

It is not necessary to determine now which set of creditors is right, and which of these orders may be right; but we cannot fail to see that if the orders made in *Wentworth* are right, that made in *Essex* must be wrong. I am here only combatting the proposition that if the latter be wrong the plaintiff is still without remedy, because it is a judicial determination.



In *Nelson v. Barter*, 2 H. & M. 334, 10 Jur. N. S. 832, the Vice-Chancellor, and on appeal the Chancellor, did not treat the circumstance of one of the parties defendant in an interpleader suit having recovered judgment against the plaintiff as a bar to the suit. It is true that the questions raised were upon a demurrer by the other defendant, but the judgment which had been recovered in the Lord Mayor's Court was referred to in the argument and in the judgment. For the demurring parties the contention was, that the judgment debt recovered against the plaintiff was not subject to foreign attachment; the answer was that it might so turn out, but that it was open to question, and that gave the plaintiffs a right to put the parties to interplead. The Vice-Chancellor in his judgment said, p. 343: "It is a question of some degree of doubt. I agree that upon the authorities it is probable that this debt would be held not to be attachable; but still there is some degree of doubt upon the point; and it appears to me that the plaintiffs ought not to be subjected to litigation or put to any inconvenience in consequence of that doubt;" thus (the demurrer being overruled) treating the validity of the judgment recovered by some of the defendants as an open question. The plaintiff had, as appears by the judgment allowed judgment to go by default.

The Vice-Chancellor alludes to this, observing: "What Barter and Cummins (the plaintiffs in the Lord Mayor's Court), who do not demur, may say, I do not know. They may perhaps be able to argue successfully that by letting judgment go by default the defendants have precluded themselves from relying on the decree of this Court as a protection against the claim on the judgment," indicating that unless so precluded the judgment would be or might be open to question in the interpleader suit.

Lord Westbury in Appeal, 10 Jur. N. S. 832, held that as it was alleged in the bill that the judgment was duly recovered, he was bound to assume that it was so, and he proceeds: "That being so, the attachment creditor is placed in the same situation towards the garnishee as if he were the

assignee of the debt. Then, notwithstanding the title which the attachment creditor gets and perfects by means of that judgment, the original creditor is still at liberty to dispute the title of the attachment creditor, and the liability of the garnishees in respect of the judgment which has been recovered against them by the attachment creditor."

The original creditor being at liberty to dispute the title obtained and perfected by the judgment, the assignee of that original creditor would be at liberty to do so, and would be the proper person to do so in the interpleader suit, and this I understand to be involved in the judgment of the Chancellor.

When one looks at the real position of the parties, there was no reason for the judgment in the Lord Mayor's Court being unimpeachable in the interpleader suit; upon the short ground that the party to contest its validity in the latter suit was no party to the proceedings which resulted in the judgment in the Lord Mayor's Court. The circumstance that the plaintiff in the interpleader suit was defendant in the Lord Mayor's Court, was in effect decided to be no bar to the title acquired by that suit being contested, unless it were shewn that, in the language of the Chancellor, "it was not defended as it ought to have been, but that the plaintiffs in equity neglected their duty and submitted to the jurisdiction."

The same principle applies in the case before us. The proper parties to contest the claim of Abel and the title acquired by him under the order made in Essex, are the creditors of Clarke, who obtained orders in Wentworth; and the fact of the plaintiff having been a party—a *quasi* defendant—to the proceedings in Essex forms no objection to the Wentworth creditors contesting Abel's claim; and it is no bar to the plaintiffs' suit unless it were shewn that the plaintiffs neglected their duty in the matter of the proceedings in Essex.

I may say here, recurring to a point to which I have already referred, that so far from this plaintiff being wrong in appearing upon the summons issued in Essex under sec.

289 of the C. L. P. Act, and objecting that the orders in Wentworth exhausted the fund, and that therefore no order should be made in Essex, he did, not only what he was at liberty to do, but what it would seem to have been his duty to do, looking at the observations of Lord Hatherley, then Vice-Chancellor, and of Lord Westbury, which I have quoted in *Nelson v. Barter*, 2 H. & M. 334, and 10 Jur. N. S. 832.

Upon the same point I would refer to the language of the Court in *Wood v. Dunn*, L. R. 2 Q. B., at p. 82, to which I have already referred upon another point: "This case (*Holmes v. Tutton*), therefore, shews that, if the present defendants had had notice of the trust deed at the time, or after the *ex parte* order of attachment was served upon them, and before the time for shewing cause, they would have had good cause to shew, and the order for payment could not have been made; and we think there can be no doubt that, in that case, the proper course to take would be to shew cause, and if the garnishee were to pay instead of shewing cause, that the assignees could recover against him."

*Crawshaw v. Thornton*, 2 M. & C. 1, is, I think, distinguishable from this case. The ground upon which it was argued for the defendant, and upon which it was decided, was, that the plaintiff had come under personal liability to one of the parties, innocently indeed, because in ignorance of the claim of the other party, but still that there was a direct contract between them, which, with the legal rights accruing under it, would be interfered with if the Court entertained a bill of interpleader. There is nothing of the kind here.

I am unable to agree with the opinion expressed in the Court below, that the plaintiffs' remedy was by appeal from the decision of the County Court of Essex, and that under the Administration of Justice Act that was their only course. If the Judge in Essex had put the Essex creditor to litigate the question raised by these plaintiffs, as contemplated by sec. 291 of the C. L. P. Act, the proceedings

suggested as proper in the Court below might have been taken, but his decision was under 290, from which there was no appeal.

In one respect I think the plaintiffs are wrong; they might safely have paid as much of the amount due to Clarke to the earlier Wentworth creditors as would leave sufficient to answer the Essex creditor in case he should establish his claim. That would have made it unnecessary to make the five earlier creditors parties to this suit, as they would be entitled to be paid in any event, and I do not see why this may not yet be done, dismissing the bill as against them, and paying them their costs.

The case is, I concede, not without its serious difficulties, but as it appears to me we should violate no principle in holding the plaintiffs not concluded by the decision of the County Court Judge in Essex, and that they are entitled to put the rival claimants to the fund in their hands to contest their respective claims to it between themselves.

In my opinion the appeal should be allowed.

BURTON, J. A.—Two of the objections raised by the respondents against the right of these plaintiffs to interplead, viz., that they claimed an interest in part of the fund, and that they had been guilty of delay, were disposed of on the argument.

The learned Vice Chancellor appears to have laboured under a misapprehension as to the power of appeal from the decision of the Judge of the County Court in a matter of this nature. If the learned County Court Judge, in the exercise of his discretion, had directed a *sci. fa.* to issue, it is probable that he might have made the other creditors parties, and that the rights of all concerned might have been adjudicated upon, and on such a proceeding there would have been a right of appeal; but in the view which I take of this case on other grounds, it is unnecessary to express any opinion as to the application of the provisions of the Administration of Justice Act to such a proceeding. With every anxiety to relieve the plaintiffs from a position



in which, without any fault of their own, they find themselves placed by reason of these rival claims, I have been unable to convince myself that this is a proper subject of interpleader in the state of facts which existed when the bill was filed.

It would appear that the defendant Clarke held a policy in the plaintiffs' company under which a loss occurred, the amount of which was disputed. After negotiations for a considerable length of time, a reference took place under the provisions of the Mutual Insurance Act to arbitrators, who made an award on the 22nd February, 1876. The plaintiffs appear to have been dissatisfied with this award, and, as I should gather from the pleadings and affidavits, proposed to move the Courts to set it aside.

Bethune, before the claim of Clarke was established by the award on the 17th December, 1875, issued a summons in the Division Court against Clarke as primary debtor and the plaintiffs as garnishees, and obtained judgment on the 28th February following.

The other defendants other than Abel also sued out writs and obtained judgment on the 28th February.

The president of the plaintiffs' company attended on the return of the summons to pay over and admitted that an award had been made, but disputed the amount, and, I assume, intimated the intention of the plaintiffs to move against it, as the County Judge in Wentworth made the order to take effect at the expiration of the first four days of Easter term next. The orders so made exhausted the whole of the insurance money.

On the 11th May, Abel, who had recovered a judgment against Clarke in Essex, served an order on the plaintiffs which had been granted by the County Court Judge in Essex, directing them to pay over the amount of that judgment and the costs of the proceeding.

Upon being served with the summons on which this order issued, the plaintiffs appeared before the Judge of Essex, and represented to him that the amount had been exhausted by previous attachments; but he, nevertheless,

made the order, on the ground that when the summonses were served, or orders made in the Division Court suits, the claim had not ripened into or become a debt, so as to be attachable under the garnishee clauses of the Act.

In this respect it can, I apprehend, admit of no question that the learned Judge was wrong. Upon the garnishees appearing and disputing the debt, he had no authority to take the course he did. It was discretionary with him under 291st section to issue a writ of *sci. fa.*, in which the garnishees would have had an opportunity of shewing that although they owed the debt to the judgment debtors they ought not to be called upon to pay Abel, because in point of fact the debt had been attached and an order to pay over made by a Court of competent jurisdiction. The defendants in such a proceeding would have an opportunity of having the question put on the record and properly tried, and an appeal would lie from the decision of the County Court in such a case to this Court. But he had no power on the garnishee disputing the debt to proceed further, and as at present advised I should say that subsequent proceedings were *coram non judice* and absolutely void.

The garnishees, on being served with the summons in the Essex case, appear to have adopted the only course that was open to them. They appeared and disputed their liability. Had they not done so, long before they could have placed a bill of interpleader on the files the creditors would have obtained by reason of their default a *valid order* for the issue of an execution; and although their appearing and disputing the debt has not prevented the Judge from making such an order, it is, I apprehend, clearly in excess of his jurisdiction.

It is quite possible that the claim was not attachable at the time the orders were made in Wentworth, but that was a matter which the Judge in Essex had no power to try. Upon its being shewn to him that such an order had been made, he was bound to abstain from further action, unless, upon application for a writ under the 291st section,

it appeared to him reasonable, in the interest of justice, that such a writ should issue. As matters now stand there are judgments in Wentworth against the garnishees which they have no means of getting rid of.

The learned Judge who made the orders has been applied to to rescind them, and has declined. But it does not follow that because these judgments, or both sets of judgments, are erroneous, that the Court of Chancery has any right to interfere. In doing so it would be assuming an appellate jurisdiction without legislative authority.

The remarks of the Judges who decided *Nelson v. Barter*, 2 H. & M. 342, would seem to warrant a proceeding of this nature; but it was unnecessary there to decide the question, as the Court held that whether the objection was well or ill founded, it was, at all events, not open to the demurring defendants.

The Vice-Chancellor guards himself from expressing any opinion as to what Barter and Cummins, the attaching creditors, might have to urge. They might, he says, "perhaps be able to argue successfully that by letting judgment go by default the plaintiffs have precluded themselves from relying on the decree of this Court as a protection against the claim on the judgment. But that does not lie in the mouth of Earley & Smith (the demurring defendants), at all." Still, he did undoubtedly express a strong opinion that it was a clear case for interpleader.

It certainly appears to be a hardship on these garnishees to be thus exposed without any fault of their own to such a liability as is shewn to have arisen in the present case, but I cannot see my way to interfering with the judgments whether erroneous or not. The remedy against such a state of things must I think be sought from the Legislature. The plaintiffs can scarcely be regarded as stakeholders, holding a fund under a single liability only, yet subject to be vexed by more than one claim. One set of claimants here have established their title by judgment and execution. The other has a judgment *de facto*, although for the

reasons I have mentioned it may, fortunately for the garnishees, be inoperative; but the Court of Chancery cannot assume the jurisdiction of reviewing these several decisions.

I think upon these grounds an interpleader bill is not sustainable, and that the appeal therefore should be dismissed with costs.

PATTERSON, J. A.—The facts shewn are, that the defendant Clark held a policy in the plaintiffs' company upon property which was destroyed by fire on 31st July 1875: that the directors of the Company proposed to pay Clark \$150 in full for his loss, and Clark not being satisfied with that amount, a reference took place under sect. 53 of the Act 36 Vict. ch. 44, O., and on 22nd February, 1876, an award was made in Clark's favour for \$623: that the company assert the right (which is not denied) to retain \$40.42 to meet future assessments on Clark's premium notes, and have \$582.58 ready to pay over: that the defendant Bethune, as primary creditor, obtained from the first Division Court of Wentworth a summons against Clark as primary debtor and the plaintiffs as garnishees, about 17th December, 1875, and on 28th February, 1876, the Judge made an order adjudging that Clark was indebted to Bethune in \$75.56 and taxed costs, and that Bethune should recover against the plaintiffs \$75.56 at a time named: that similar proceedings were taken by seven other creditors of Clark, who are now defendants, resulting in the making on 28th February of seven other orders to pay, and absorbing the whole amount payable under the award: that on 5th May, 1876, an order was made by the Judge of the County Court of Essex, that the plaintiffs should pay to the defendant Abel \$208 and the costs of the proceedings to obtain that order, being the amount of a judgment recovered in that Court by Abel against Clark and another, and that in default of payment execution should issue for the amount: that notwithstanding that the plaintiffs opposed the last mentioned order the Judge made it with full knowledge of the facts concerning the



Wentworth orders, holding that when the summonses issued in Wentworth there was no attachable debt due from the plaintiffs to Clark : and that the plaintiffs have unsuccessfully applied to the Judge of the County Court in Wentworth to rescind the orders made there. And the plaintiffs ask that the defendants may be ordered to interplead to try the right to the money due under the award, and that in the meantime the garnishing creditors may be restrained from enforcing their orders.

An injunction was refused by Vice Chancellor Proudfoot, on the ground that the remedy of the plaintiffs was in the Court in which judgment was obtained, and that in the proceedings in Essex all the claimants might have been summoned under sect. 8 of the Administration of Justice Act, 1873, 36 Vic. ch. 8, and a judgment or decree made adjusting all the rights of the parties. The learned Vice Chancellor considered the decision in *Henderson v. Watson*, 23 Grant 355, had put a construction on the Act which governed this case, and he intimated his opinion that if the course he points out had been taken, the parties might have appealed if dissatisfied with the decision of the County Court.

There is a good deal in the proceedings both in the Division Court and the County Court calculated to make the questions which have been discussed before us somewhat perplexing. The whole of this litigation, which must necessarily be expensive beyond proportion to the interests properly in question, is to be regretted ; and it is impossible to shut one's eyes to the circumstance that the plaintiffs might have avoided it by the simple expedient of paying their debts when due.

The fire occurred on 31st July 1875. By sect. 52 of the Act of 1873, 36 Vic. ch. 44, the money was payable in three months after proof of loss. We are not expressly told when the proof was made, but we are told that the company offered \$150 in full of Clark's claim of \$700, and it was not until 22nd February 1876, or nearly seven months after the fire, that the award was made. I see no

reason why the company should not then have at once paid the money they are now vexed about. No statutory delay intervened. Then when the Division Court orders were made on 28th February the money might have been paid under them, and that payment would have protected the plaintiffs even though the validity of the orders was open to question, as they were afterwards questioned by Abel, though Clark does not appear to have objected to them. See Division Court Act of 1869, 32 Vic. ch. 23, sections 6, 7, 9, 10, and 14, and see *Wood v. Dunn* L. R. 2 Q. B. 73, and *European Bank v. Fox*, L. R. 2 Q. B. 85.

They preferred however, for reasons of their own, to hold the money, and in May the County Court order was made. Having thus involved themselves in the difficulty they at length take the present proceeding which, whatever merits it may be found to have, must work hardship towards the Division Court suitors, or some of them, to which they ought not to have been exposed.

The amount attached in the County Court is \$208, part of a debt of \$582 which the plaintiffs admit they owe. They can only ask to interplead about the \$208. It is hard to see why all the eight Division Court creditors are brought here, or why the plaintiffs, if they do not dispute the orders, have not paid them in the order of their priorities until only \$208 of the fund remained in their hands, and then brought only the claimants of that money into Court. There are very strong grounds for holding that the conduct of the plaintiffs, as shewn upon the materials before us, deprives them of any right to the relief they ask; and that instead of occupying the position of mere stakeholders, claiming no interest in the fund and ready to pay it to the persons entitled, they wrongfully retained the money in their hands when it ought to have been paid over either to Clark or the Division Court creditors, and when as yet the claim of Abel had not been made; and to this day they retain, without the excuse of a counter claim, all the excess over the \$208.

It is not necessary, however, to let the decision turn on

the conduct of the plaintiffs, as in my opinion the appeal should be dismissed on grounds depending on the rights of the plaintiff in the County Court garnishee proceedings.

By section 289 of the C. L. P. Act the attaching order bound all debts owing by or accruing from the defendants to Clark. If the debt on the award was due by the plaintiffs to Clark it was bound; if the plaintiffs were no longer liable to pay it to Clark by reason of the Division Court orders, or for any other reason, the attaching order had no operation upon it: *Hirsch v. Coates*, 18 C. B. 757.

Then a summons issued under section 289, calling on these plaintiffs to shew cause why they should not pay Abel the \$208 which he claimed. They appeared and represented to the Judge that the Division Court orders had been made. The affidavit before us shews that they opposed the making of the order on this ground, and the fact that the Judge gave costs against them makes it clear that there was a real contest. In these circumstances it is clear that the Judge had no jurisdiction to make the order to pay. It is only when the garnishee does not dispute the debt, or does not appear, that any power is given to the Judge to make an order in a summary manner. When the C. L. P. Act was passed, the principle at Common Law was that disputed facts should be tried by a jury, and it is still the right of the litigants, when no express statutory abridgment of that right has taken place, to have questions of fact so adjudicated upon. There was no idea of transferring to the Judge the power to try in a summary manner in a proceeding of this kind the questions which he would necessarily have had to submit to a jury, or to dispose of as formal matters of record if they had been raised in an action brought for the same debt by the judgment debtor against the garnishee. The Judge of the County Court overlooked this want of jurisdiction, and, what is more surprising, assumed to disregard or pronounce against the judgment of a Court of co-ordinate jurisdiction, and this in a summary proceeding from which, if within his jurisdiction, there was no appeal.

It is quite clear that when the dispute arose the Judge had no longer power to order the execution to issue. The words in section 291: "If the garnishee disputes his liability the Judge instead of making an order that execution shall issue, may order that the judgment creditor may proceed against the garnishee by writ," do not imply a discretion in the Judge to order the execution or direct the writ to issue. It would be contrary to all principle to issue execution for a disputed claim until an adjudication has taken place, and there is no power given to adjudicate summarily on the matter. Section 290 enacts that if there is *no dispute an execution may issue*. The liability is established by the admission of the garnishee, not by the judgment of the Judge, and the execution follows as much as a ministerial as a judicial act.

It may appear to the Judge that the claim is clearly disproved by the cause shewn by the garnishee, or that the circumstances make it inequitable that further proceedings should be taken in the matter, and the statute therefore makes it discretionary with him to allow the issue of the writ by the judgment creditor under section 291. He may refuse permission to proceed by writ. This is the discretion which is created by the words "may order," &c. But it is clear that no further proceeding can be had except under that process: *Wise v. Birkenshaw*, 29 L. J. Ex. 240. If the Judge orders the judgment creditor to proceed by writ and he declines to do so, the original *ex parte* attaching order will be dismissed with costs: *Wintle v. Williams*, 3 H. & N. 288.

Now the position of this matter is, that all proceedings, after the appearance on the summons and statement of the plaintiffs' dispute as to their liability to pay Clark the money, are simply void. The attaching order remains and binds the debt unless it is effectually attached by the Division Court orders.

If Abel declines to proceed by writ, his attaching order should be dismissed. If he proceeds, then an action will be instituted under the provisions of section 291, in which



Abel will be plaintiff and these plaintiffs defendants, and in which the proceedings are to be as nearly as may be the same as on a writ of Revivor under the same Act.

That action will give an opportunity for these plaintiffs to have their defence fully investigated ; will enable the Court, if necessary, to bring before it all other persons claiming an interest in the fund ; and will give either party access to this Court by way of appeal. The intervention of the Court of Chancery is therefore unnecessary.

The principle on which I would thus dispose of the case resembles, though it may not be identical with, that acted on by the learned Vice Chancellor, although I do not found it upon the Administration of Justice Act. The defence of the plaintiffs to the suit, if Abel should proceed by *scire facias* under section 291, would be a legal and not an equitable defence. The powers given by section 8 of the Act, 36 Vic. ch. 8, would not necessarily come into operation, though they might do so if it became necessary or was considered proper to bring other parties before the Court ; and, therefore, if my opinion is correct, this bill fails for want of equity quite irrespective of any effect of the Administration of Justice Act.

The short note which we have of the grounds of the Vice Chancellor's decision may perhaps convey only imperfectly his opinion of the application of the Act to this case. As I have just said, the right of the plaintiffs to make a full defence in the County Court, being a legal right, exists apart from the statute, yet the statute may have to be invoked to enable outside parties to be brought into Court ; but in my view of the law that could be done only when their presence was necessary to the final disposition of some matter *in question in an action*, and not in the course of a summary proceeding collateral to an action. The only action in the County Court was that of *Abel v. Clark*. That action had been determined and all matters in question in it had been finally concluded by the judgment in Abel's favour. The garnishee proceedings were entirely collateral and outside of the action. If the

learned Vice Chancellor is to be understood to hold that in this proceeding the power to call other parties before the Judge could have been properly exercised under the Administration of Justice Act, I cannot concur in his opinion. But he may have had in his mind the proceeding by *scire facias* under section 291, in which an action would have been constituted. This seems probable from his reference to the right of appeal which would exist if the questions were formally decided in an action, but not in case of a decision on a summary application.

I think it is obvious that the 8th section does not necessarily require a construction which will permit the exercise of the new and extensive powers conferred on Courts of Law in proceedings collateral to an action. In my opinion the proper reading of the section requires a contrary construction.

The earlier sections of the Act empower Courts of Law to entertain actions for purely money demands although the plaintiff's right may be an equitable one, and to investigate equitable rights advanced by pleas or subsequent pleadings, as well as in ejectment where there are no pleadings technically so called; and then the 8th section provides generally that, for the purpose of carrying into effect the objects of the Act and for causing complete and final justice to be done in all matters *in question in an action at law*, the Court or a Judge thereof, according to the circumstances of the case, may at the trial or at any other stage of an action or other proceeding pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require, and may make such rule or order as to adding *third* (which I suppose means *other*) persons as parties to any proceeding, striking out parties, or treating parties named plaintiffs as defendants, or parties named defendants as plaintiffs, and as to costs, and may direct such enquiries to be made and accounts to be taken as shall seem reasonable and just, and may as fully dispose of the *rights and matters in question* as a Court of Equity could do. The whole of the section,

from the reference at starting to *all matters in question in an action at law* to the repetition of the same words at the end, is framed with a view to an action and to the pleadings in an action, and not to collateral or summary applications.

There are good reasons why, in my judgment, we should avoid any straining of the language of the enactment and any attempt to extend its scope beyond the limits expressly indicated. One reason is supplied by the doctrine which has been held, and which is now questioned, that whatever equitable rights may be advanced for adjudication under the clause must be so advanced, and whether advanced or not cannot afterwards be made the grounds for relief in Equity.

This doctrine is a very distinct advance beyond what has hitherto been held.

The Courts of Equity held in such cases as *Kingsford v. Swinford*, and *Gompertz v. Pooley*, 5 Jur. N. S. 261, that under the C. L. P. Act a defendant who had an equitable defence was not compelled to plead it at law, but might proceed in equity to restrain the plaintiff at law. If the Administration of Justice Act has any more stringent effect, that must be due rather to the general intention gathered from the tenor and apparent object of the Act than from any direct expression. The language of the first section, declaring that the "Courts of Law and Equity shall be, as far as possible, *auxiliary to one another* respectively, for the more speedy, convenient, and inexpensive administration of justice in every case," does not assert the principle that each Court shall dispose of all rights connected with the subject of litigation without the assistance of the other.

It is not necessary for the purpose of this appeal, and would therefore be unwise, to attempt to define the exact limits within which the doctrine in question can properly be applied. At law when a plaintiff asserted in an action his right, whatever was its character, the judgment of the Court in his favor was necessarily conclusive as against

all legal grounds of defence. It may be that the effect of the statute should be held to be that a judgment at law in favour of a plaintiff is conclusive as against equitable as well as legal defences; and that the plaintiff having established his right, the defendant shall not have it in his power to enjoin him in equity from enforcing his judgment.

I do not wish, without necessity and in the absence of argument on the point, to express an opinion that this is the necessary effect of the statute. It strikes me as not an unreasonable construction, yet it seems opposed to that applied to language in the C. L. P. Act which is not easily distinguishable. But even if prepared to go that length, I should have great hesitation in attempting to carry the rule further, and I could not accede, without more mature consideration of the question than the present case calls for, to the application of the statute which has been made in some recent cases.

It is scarcely necessary to say that the power to finally dispose of all matters in question in an action at law, not merely the claim asserted by the plaintiff but such matters as may be brought in question by the defence, and if necessary to give substantive relief to the defendant, does not necessarily involve the duty to bring into question matters unnecessary to the defence, on pain of being forever excluded from asserting them in a Court of equity, merely because under the rule of pleading or practice initiated by the statute it may not be improper to do so.

Before assenting to the propriety of adopting such a rule, it would be necessary to take a wide view of the subject, including, amongst other considerations, the grounds of decision in cases such as those to which I have already referred, of *Kingsford v. Swinford* and *Gompertz v. Pooley*, 5 Jur. N. S. 261, and also the right which has never been denied, to bring a cross action for any claim capable of being asserted either as a ground of action or of defence, and the principle on which it was always optional to plead a debt by way of set-off or to sue for it, even since



our C. L. P. Act enabled the Court to treat the defendant as plaintiff and the plaintiff as defendant, and to render a verdict for the defendant for the excess of his claim over that established against him. See *Parsons v. Crabb*, 31 U. C. R. 434.

My opinion that the present bill is unnecessary and was properly dismissed is not founded on the operation of the Act, at all events so far as the Act is relied on as excluding the plaintiffs from resorting to Equity. It proceeds upon the ground that the later proceedings in the County Court being *ultra vires* and void, the plaintiffs are still in a position to assert their rights in that Court, and to obtain there a complete adjudication upon the matters in dispute, the previous powers of the Court being supplemented by the new powers conferred by the Act, if necessary to call those powers into requisition.

I must not, however, be understood to imply that, if the County Court order had been valid, a proper case for interpleader would have been presented. The inclination of my opinion is against that proposition, as I am unable to distinguish the effect of such a proceeding from an appeal from the decision of a Court over which the Court of Chancery possesses no appellate jurisdiction. Neither must I be understood to suggest, when alluding to the power to make the Division Court judgment creditors parties to an action in the County Court, that it should or should not be considered necessary or proper to do so, as the necessity or propriety might depend on facts not before us; or that, if they were parties, the County Court could review the proceedings in the Division Court or look behind the fact that judgments of that Court existed; and, setting aside the conclusive character of those judgments, I intimate no opinion against the view of the law or the apprehension of the requirements of justice upon which they proceeded.

I think the appeal should be dismissed with costs.

Moss, J. A.—The plaintiffs undoubtedly are placed, or have placed themselves, in an unfortunate position. If the

Division Court judgments on the one hand, and the County Court order on the other, may be enforced against them, they will be compelled to pay the creditors of Clarke a larger sum than was awarded to him by the arbitrators.

But this misfortune alone will not entitle them to interplead. Before that relief is afforded, they are bound to clearly bring themselves within the doctrines which have been established with regard to the exercise of this jurisdiction by Courts of Equity. With great deference to the contrary opinion, I think that this is far from being a case in which the Court should be astute to discover reasons for supporting this remedy, or from a natural desire to save the plaintiffs from paying a larger sum than that for which they were originally liable, should strive to extend the limits within which the jurisdiction has been exercised. We may well pause before declaring that our system of jurisprudence permits the filing of a bill in Chancery against eight Division Court creditors, whose claims in the aggregate barely exceed \$580, for the determination of the question whether some of them are entitled to receive from the plaintiffs the sum of \$208, or whether the plaintiffs should pay it to another person. One of these creditors now finds himself in this Court, because he has been unfortunate enough not only to have a claim for \$17.70 against Clarke, but to have attempted to obtain payment by recovering judgment for the amount against these plaintiffs. This seems bad enough, but it might be only the commencement of his misfortunes, if this appeal were to succeed. Its object is to obtain the reversal of an order refusing an injunction, for which the plaintiffs applied, to restrain the various judgments and the order against the plaintiffs. If that injunction be now granted, an interpleader decree will be moved for, and will follow almost, if not quite, as of course. If the ordinary practice be pursued, that will contain a reference to the Master to settle the conflicting claims of the defendants; but the plaintiffs will be practically discharged from the suit, with the solatium of their costs.

The different defendants will then engage in the Master's office in their internecine struggle, a proceeding not unattended with expense. Suppose that it be held that Abel is entitled to priority, the result will be that some three or at most four of the Division Court creditors will be excluded from participation in the fund, which the plaintiffs now propose to bring into Chancery.

In the ordinary course they will be directed to pay the costs of the plaintiffs, the other Division Court creditors, and Abel; and if he who holds the judgment for \$17.70 is one of them, and the only one who is not proof against execution, on his shoulders may the whole burden fall. A consequence so deplorable as to be little short of a scandal might thus be visited on a man whose conduct was void of offence, who had violated no rule of moral or municipal law, who had done nothing worse than to submit to the appropriate tribunal his legal right to be paid his small claim; and this would be consummated in order to extricate these plaintiffs from an embarrassment which, as my brother Patterson has pointed out, they might easily have escaped. But the contemplation of this possible consequence does not, I hope, make me forget that we are here to administer the law, and would not lead me to refuse to the plaintiffs any rights to the enforcement of which established rules shewed them to be entitled, but it certainly relieves me from any temptation to expand these rules for their behoof. It seems to me to be pre-eminently a case in which we may say with Lord Hardwicke, that we are not willing to allow *new inventions* in bringing bills of interpleader: *Metcalf v. Hervey*, 1 Ves. 249.

It is conceded that no case precisely in point can be found in the English authorities, or in our own reports.

The decision by the Supreme Court of the State of Virginia in *Yarborough v. Thomson*, 3 Smeades & Marsh. 291, presents closer features of resemblance than any case to which we have been referred. An endorser of a promissory note and an attaching creditor of the payee had both recovered judgments against the maker for the amount of the note.

Through erroneous advice, or a misconception of his position, he had become involved in this double liability. But it was held not to be a case for interpleader. It was held, and as I think in strict accordance with principle, that a Court of Equity has neither jurisdiction to correct errors in the judgment of a Court of Law, or power to compel a party to relinquish a judgment at law, because his adversary did not comprehend his rights, or was mistaken in matter of law. If this view of the law be accepted, it requires no further reference to the facts of this case than my learned brethren have made to shew that it is decisive against the plaintiffs. The mishap to them has arisen either from an erroneous view of the law by the Division Court or the County Court Judge, or from their own misapprehension of what was proper for their protection, and is, if the above view be correct, beyond the reach of the healing hand of the Court of Chancery.

I think there are, as I shall endeavour to shew presently, special reasons why the existence of the Division Court judgments precludes any resort to Chancery, but it may be observed that the general statements or definitions of the nature of the right of interpleader given by authorities of high repute do not seem to cover this case.

In *Glyn v. Duesbury*, 11 Sim. 147, Sir L. Shadwell says, that "a case of interpleader arises where the same subject, whether debt, duty or thing, is claimed."

It is stated in the last edition of Story that the object of the bill is to protect the complainant from the vexation attendant upon defending all the suits that may be instituted against him for the same property. It seems to me that the proceedings here have advanced a stage beyond the limits of these rules. The defendants are no longer claiming the same debt.

Assuming the validity of both sets of judgments—and the plaintiffs do not, if indeed consistently with the rules of interpleader they could, impeach either—the defendants have recovered by process of law judgments which they are at liberty to enforce by executions.



The plaintiffs are under a position of individual liability to them. It is now indifferent to these defendants what may have been the amount of the plaintiffs' original debt to Clarke, for each of them has a judgment of a Court of competent jurisdiction for a certain sum of money against the plaintiffs.

In *Crawshay v. Thornton*, 2 M. & C. 1, Lord Cottenham laid it down that the case must be that the whole of the rights claimed by the defendant may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest. He held that a case undoubtedly could not be one for interpleader, if the injunction, which is of course if the case be a proper subject for interpleader, would deprive a defendant having a case beyond the question of property, of part of his legal remedy, with the possibility at least of failing in the contest with his co-defendant, in which case the injunction would deprive him of a legal right without affording him any equivalent or compensation.

I do not mean to say that either the general language of that very learned Judge, or the decision in the case, is precisely in point, but it shews the great stress which the Court has always laid upon the plaintiff's ability to maintain that his position is simply that of a stakeholder, who, without having incurred any special personal responsibility, is ready to pay the money or deliver the property to the person entitled.

In *Larabrie v. Brown*, 1 DeG. & J. 204, the plaintiffs procured through Magnus & Co. a supply of coal which was furnished by Brown & Marr. The latter firm, in December, sued the plaintiffs at law for the price of the coal, the plaintiffs contending that there was no contract with them, but that their agreement was solely with Magnus & Co., who had purchased from Brown & Marr on their own account. In the following February the action was tried, and Brown & Marr obtained a verdict. On the 16th April a motion for a new trial was refused, and on the

23rd April a bill of interpleader was filed. Knight Bruce, L. J., thought the delay was fatal, but Turner, L. J., concurred in refusing relief on a ground that appears applicable to this case. He characterized the bill as being in the nature of a bill for a new trial, and said the question was, whether the plaintiffs were debtors at law to Brown & Marr, and it had been decided that they were. So in this case the question was whether the plaintiffs were, in consequence of their relation to Clark, liable to judgments against them. It has been decided by the appropriate tribunals that they are, and they cannot now ask the Court of Chancery to free them from that liability.

It appears probable that upon the proper construction of the garnishee clauses in the C. L. P. Act the learned County Judge of the county of Essex had no authority to make a summary order for payment by the plaintiffs. As they disputed their liability, there is strong reason for thinking that the course absolutely prescribed by the statute, if he did not see his way to refusing the application of the judgment creditor, was to direct the issue of a writ, or rather to give the creditor the option of taking a writ. Even if that course were not imperative, it is tolerably obvious that in the exercise of a reasonable discretion it should have been adopted. So far as appears it was not suggested to him, and did not present itself to his mind. But while I cannot say that I entertain any serious doubt, as at present advised, respecting the true construction of the statute, I do not feel called upon to pronounce any judicial opinion to that effect. The point has not been made by the plaintiffs. No argument upon it has been addressed to the Court. Indeed, so far as I can perceive, it is not the interpretation which the plaintiffs themselves place upon the statute. They do not complain that the order is invalid. On the contrary, so far as I could gather from the casual reference made to it, they are of opinion that it is correct, and that the orders in Wentworth are objectionable.

Instead of treating the Essex order as *ultra vires*, they applied to the Judge of Wentworth to vacate his judg-

ments. I do not think, however, that this action on their part should be strongly pressed to their prejudice, because I have no reason to doubt that it was taken, as stated at the bar, with the view of establishing that they had resorted to everything possible before filing the bill. I only refer to it for the purpose of shewing that we ought not now, in my opinion, to pronounce upon the validity of that order. The plaintiffs call upon the different sets of defendants to interplead in respect of their claims founded upon their orders. This assumes that all the orders *may* be valid.

But even if we were at liberty to consider at this stage the jurisdiction of the Judge of the County Court of Essex, I think it could not assist the plaintiffs. It cannot be disputed that the plaintiffs must, in order to maintain their suit, shew that by the decision of the Court of Chancery some of the Division Court creditors can be deprived of the benefit of their judgments. If these judgments are incontrovertible, if they are beyond the control of the Court, there can be no interpleader. In my opinion the provisions relating to the garnishing of debts in the Division Court have been designedly framed in conformity with the general policy, which makes the judgments of that tribunal final and conclusive.

The ground on which it is suggested that these orders are inoperative, and on which the learned Judge of the County Court of Essex is alleged to have acted, is, that when the summons issued under sec. 7 of 32 Vic. ch. 23, O., was served upon the plaintiffs there was no debt, in the strict and proper sense of the term, due from the plaintiffs to Clark.

I presume that *Dresser v. Johns*, 6 C. B. N. S. 429, is the authority relied upon for that proposition, although it was not commented upon in the argument.

It appears to me that the facts of that case make it distinguishable from the present.

On the 21st February, 1859, Johns recovered a verdict against the Maritime Passengers Assurance Company, on

which judgment was signed on the 8th of March. Dresser, who had previously recovered a judgment against Johns, obtained an attaching order and an order *nisi* for payment on the 4th of March. On the same day a Mr. Chelton obtained a similar order. On the 10th of March, after the judgment was signed, Chelton obtained a second order to attach the debt. On the 11th of March, a Judge, refusing to hear Chelton because he was not a party to the order *nisi* obtained by Dresser, ordered payment by the company to Dresser. The money having afterwards been ordered into Court, the question was, whether it should be paid to Dresser or to Chelton. It was held that the order of the 11th of March was invalid as against Chelton, because there was no debt owing or accruing when the order *nisi* was made, and that Chelton therefore had the better right.

But the distinction between that case and the present is, that when the order which was declared invalid, was made Chelton had obtained a valid attaching order. He had, therefore, bound this money before the order for paying it to Dresser had been made. Clearly, therefore, an order could not be made in favour of Dresser to pay him money, to which, up to that moment, he had acquired no right, but which, on the contrary, was attached for the benefit of Chelton in the hands of the company.

Here when the Division Court judgments were pronounced, there was a debt due from the company to Clarke, the primary debtor. The existence of a debt to some amount was not disputed by them, although they alleged that the amount ought to be reduced.

There are weighty considerations in favour of the opinion that the rule adopted in *Dresser v. Johns* is not applicable under such circumstances. At any rate the Judge of the Division Court must have been of that opinion, and I do not think that any other Court is invested with authority to review its correctness.

I have already intimated that a careful perusal of the Act leads to the conclusion that it was intended that the judgment of the Division Court should in this class of cases



possess the same quality of finality as in others. Under the 7th sec. a creditor may serve a joint summons on his debtor and a garnishee without obtaining any attaching order calling upon the debtor to answer his claim, and upon the garnishee to shew whether he owes any debt to the primary debtor, and why he should not pay the same into Court or to the primary creditor to the extent of his claim. On the hearing the Judge, on proof of the debt due the primary debtor, and also of the *amount owing* to him from the garnishee, may give judgment against the garnishee for the amount found due from him to the extent of the amount found due from the primary debtor. Upon this hearing the primary debtor, the garnishee, and all other parties in any way interested in or to be affected by the proceeding, are entitled, under sec. 8, to shew any just cause why the debt sought to be garnished should not be paid over or applied toward the satisfaction of the claim of the primary creditor. If judgment be given against the garnishee, he may pay the money either into Court or to the primary creditor, and this shall be a discharge as between him and the primary debtor.

At any time before the money is actually paid by the garnishee, any person interested in it may apply to the Judge that it shall be discharged from the claim of the primary creditor; and even after the money is paid over all parties may be remitted to their original rights except as against the garnishee, who shall remain discharged. The Judge may call before him by summons any person claiming to be entitled to the debt by assignment or otherwise, and may decide as the justice of the case requires.

All these provisions seem to point to the conclusion that the Legislature intended that a decision by the Division Court in these cases should put an end to litigation. The learned Judge of the Division Court determined that the garnishee was at the hearing indebted to the primary debtor. This was strictly correct in point of fact. He also adjudged that satisfaction should be made to the primary creditor out of this indebtedness. I am not pre-

pared to say that under the circumstances this was not a proper conclusion. Indeed, so far as I have formed an opinion, it coincides with his. But at any rate the law made him the Court of last resort to determine the question.

In argument much stress was laid upon the decision in *Nelson v. Barter*, 2 H. & M. 334, but I do not think that it by any means governs this case. The question there was presented to the Court upon a demurrer by the defendants Early and Smith. They were the assignees of a claim against the plaintiff. After notice of the assignment the plaintiffs were served with process of settlement out of the Lord Mayor's Court against the assignor, of which they informed Early and Smith, who declined to advise them to take any action in the matter. Accordingly they allowed judgment to pass against them by default, and then filed the bill.

The Court, while expressly refraining from pronouncing any opinion upon the right which the attaching creditor might have to urge that he had acquired a fixed right by his judgment, held that the demurring defendants were precluded by their conduct from objecting that it was not a fit case for interpleader. They had in effect said to the plaintiffs, you may allow judgment to go by default, if you please. As these defendants could only enforce their rights as assignees in equity, the Court was peculiarly free to deal with them. Any inequitable conduct on their part was a fair subject for consideration.

Moreover, as I understand the law relating to attachment in the Lord Mayor's Court, and as Lord Westbury seems to me to have stated it, the primary debtor is, notwithstanding the judgment against the garnishee, entitled to dispute the primary claim, and the judgment therefore cannot be deemed conclusive in any such sense as that of the Division Court in this case. These considerations meet any argument that the case is precisely in point, and does not compel us to follow it under the different circumstances existing here. It may be remarked that there is no record in the reports of the ultimate result of that case.

There is a subordinate ground, which seems fatal to this appeal. The motion was for an injunction to restrain a number of Division Court creditors, as well as Abel. The figures shew that only three or four, at most, of these creditors can be affected. Five or six of them are in any event entitled to hold their judgments. With which of them can Abel be compelled to interplead, and which of them are liable to an interpleader with him? As between themselves, these Division Court creditors necessarily have an ascertained priority. They cannot be compelled to interplead with each other. If any of them are bound to interplead with Abel, it must be the three or, at most, the four who stand last in priority. It might, perhaps, be inferred that the defendant Bethune held the first place, but every one of the others may allege that, for all that appears, he is second, and thus, in any event, unaffected by Abel's claim. The plaintiff, therefore, has failed to shew any ground on which any of these Division Court creditors should be enjoined from enforcing payment.

Upon this point, I understand his Lordship, the Chancellor, to hold the same opinion as to the impropriety of the earlier creditors being made parties. It seems to me that the conclusion is irresistible that the Vice-Chancellor was bound to refuse the injunction.

Without reference, therefore, to the Administration of Justice Act, upon the general effect of which it is thought better not to express an opinion in the present case, I think the order of the Vice-Chancellor was right, and that the appeal should be dismissed with costs.

*Appeal dismissed.*

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## SMILES V. BELFORD ET AL.

*Copyright—38 Vic c. 88, D.*

*Held*, affirming the judgment of PROUDFOOT, V. C., 23 Grant 590, that it is not necessary for the author of a book, who has duly copyrighted the work in England under 5 & 6 Vic. ch. 45, to copyright it in Canada under the Copyright Act of 1875, with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada.

*Quære*, as to the admissibility, with a view to the construction of a statute, of the language used by the Secretary of the State for the Colonies in introducing it in Parliament.

APPEAL from a decree of the Court of Chancery, granting an injunction to restrain the infringement of a copyright, reported 23 Gr. 590. The pleadings and facts are fully stated there.

The appellants' reasons of appeal were:—

1. That since the British North America Act (section 91, sub-sec. 23), the Parliament of Canada has had the sole and exclusive authority to legislate in relation to "Copyright" in Canada, and that such authority is exclusive of the Imperial Parliament as well as of the Legislatures of the several Provinces in the Dominion; and consequently the Act of 1875 is operative, and has the force of law in Canada, notwithstanding the Act of 1842, or any other Act whatever: *Regina v. Taylor*, 36, U. C. R. 183, 220; *Re Goodhue*, 19 Gr. 396; *Shortt* on Copyright, 65, 92; British N. A. Act, sec. 56; Imperial Act, 28 & 29 Vic. ch. 63.

2, The appellants contend that the respondent, not having registered at Stationers' Hall the book "Thrift" at the time (11th December, 1875,) at which the "Copyright Act of 1875" came into force, had no copyright under the Imperial Act, 5 & 6 Vic. ch. 45 (1842), and that he could not after that date acquire copyright in Canada, except under the Canadian Copyright Act, 38 Vic. ch. 88, and that registration thereunder is necessary to secure the copyright in Canada, or the sole and exclusive right to print, publish, and sell in Canada.



3. That the Imperial "Canada Copyright Act, 1875" (38 & 39 Vic. ch. 53), and the Queen's Proclamation pursuant to that Act stating the date when the Canadian "Copyright Act" should come into operation, gave the Canadian "Copyright Act" the force of law in Canada, notwithstanding the "Colonial Laws Validity Act" (28 & 29 Vic. ch. 63), or the "Imperial Copyright Act" (5 & 6 Vic. ch. 45), or any other Act whatever, and to the extent of the provisions of the Canadian "Copyright Act," superseded, or in effect repealed, the Imperial Copyright Act of 1842 in Canada from the 11th December, 1875; or at all events the legislation is cumulative, and if the Imperial Act is in force in Canada, the provisions of the Canadian Act are super-added, and must be complied with to give copyright in Canada: 38 & 39 Vic. ch. 53, sec. 3 Imp.; *Dwarris* on Statutes, p. 530; *Dow v. Black*, L. R. 6 P. C. 272; *L'Union Jacques de Montreal v. Belisle*, L. R. 6 P. C. 31.

4. The Imperial Copyright Act, 1875, not only removed the difficulty as to repugnancy of the Canadian Act, as against the Order in Council of July, 1868, but also, read in conjunction with the confirmed Act, makes it necessary for the British author to secure copyright in Canada, under the Canadian Act, to prevent the reprinting, republishing, and sale in Canada, as well as the importation of foreign reprints of works of British authors, and unless such copyright be secured under the Canadian Act, there is no legal prohibition to the reprinting, republishing, or sale of any work of a British author in Canada: Imperial Act, 38 & 39 Vic. c. 53; Preamble, paragraph 3, and secs. 4 & 5.

5: The Canadian Copyright Act requires all authors desirous of obtaining copyright in Canada to print and publish and register under that Act. And the appellants contend that the said Act in that respect includes and applies to authors or publishers in England, though they should have copyright under the Imperial Act of 1842: 38 Vic. ch. 88. secs. 4, 11, 15.

6. That the respondent not having printed or published

in Canada, and not having registered, either for interim copyright or otherwise, the said book in the office of the Minister of Agriculture, as required by the Canadian Copyright Act, is not entitled to copyright in Canada, or the sole and exclusive right of publication and sale therein : 38 Vic. ch. 88, sec. 4 ; 31 Vic. ch. 54, sec. 6 (Canadian Act of 1868.)

7. That the respondent, not having obtained interim or other copyright in said book, and not having printed or published the same in Canada, and the appellants having first printed and published said book after the time allowed by the said Act (see sec. 10) for the author to print, publish, and register in Canada, they, the appellants, are solely entitled to copyright thereof, under secs. 11 and 15 of said Act.

8. That the bill is not sustained in law, and the plaintiff is not entitled to the relief prayed for, and the decree of the Court below is erroneous in granting an injunction or any relief in favour of the plaintiff, and should be reversed, and exceeds the jurisdiction of the Court in restraining the publication or sale beyond the Province of Ontario ; and no costs should have been decreed against the defendants below.

The appellants also refer to the report of this case in 23 Gr. 590, and the cases cited therein by counsel for the appellants.

The following were the respondent's reasons against the appeal :—

1. The respondent by publishing in England, in November, 1875, the work "Thrift," of which he is the author, secured "the sole and exclusive right of printing and otherwise multiplying copies" of the said book throughout "Great Britain and Ireland and all the Colonies thereof," and "every part of the British dominions," including Canada : 5 & 6 Vic. ch. 45, sec. 2 (Imp. Stat.) ; 5 & 6 Vic. ch. 45, sec. 29 (Imp. Stat.) ; *Routledge v. Low*, L. R. 3 E. & I. App. 100, 110, 113, 118 ; *Low v. Routledge*, L. R. 1 Ch. App. 45, 47.

2. The copyright secured by the Imperial Statute 5 and 6 Vic. ch. 45, in any book accrues upon and takes effect from the date of "the first publication of such book." The registration at Stationers' Hall permitted by this statute, and the preceding Acts of 8 Anne, c. 19, 41 Geo. III. ch. 107, and 54 Geo. III. c. 156, was intended only to give notice of existing copyrights. Non-registration affected only the right to sue or to exact the penalties imposed by these Statutes, not the existence of the copyright: 5 & 6 Vic. ch. 45, secs. 3, 17; *Chappell v. Davidson*, 25 L. J. C. P. 225; *Jeffreys v. Boosey*, 4 H. L. C. 815, 847, 886, and per Lord Cranworth, C., at p. 955; 8 Anne ch. 19, sec. 2; 41 Geo. III. c. 107, s. 4; 54 Geo. III. ch. 156, sec. 5; 5 & 6 Vic. ch. 45, secs. 13, 24; *Tonson v. Collins*, 1 W. Bl. 330, per Lord Mansfield; *Beckford v. Hood*, 7 T. R. 626; *Cambridge v. Bryer*, 16 East 317, 322; *Murray v. Bogue*, 1 Drew. 533. 364.

3. Upon publication in England on the 15th November, 1875, the respondent became entitled to the protection of the said Act of 5 & 6 Vic. ch. 45, except in so far as that protection was affected in certain colonies by the Imperial Act 10 & 11 Vic. ch. 95, and by Colonial Statutes passed thereunder. By virtue of certain Canadian Statutes; passed under the authority of the said Act, 10 & 11 Vic. ch. 95, the respondent's rights in Canada on the 15th November, 1875, were less than his rights in England in this:—that foreign reprints of his said book were, under the authority of the said Acts, permitted to be imported into Canada without the consent of the respondent upon payment of a certain duty for his benefit: 13 & 14 Vic. ch. 6 (1850); 22 Vic. ch. 76, sec. 2 (1858); 22 Vic. ch. 2, sec. 2 (1859); 31 Vic. ch. 7 (Ca.) Sched. p. 150 (1867); 31 Vic. ch. 56 (Ca.) (1868); Proclamation of 24th September, 1868, in *Canada Gazette* of that date.

4. Except as aforesaid, the Imperial Act 5 & 6 Vic. ch. 45, and the copyright thereby secured, was not and could not before Confederation be affected by colonial legislation, since such legislation would have been repugnant to and

inconsistent with the said Imperial Acts : 8 & 9 Wm. III. ch. 20, sec. 69 ; 7 & 8 Wm. III. ch. 22, sec. 3 ; 3 & 4 Wm. IV. ch. 59, sec. 56 ; 3 & 4 Vic. ch. 35, sec. 3 ; 8 & 9 Vic. ch. 93 ; 28 & 29 Vic. ch. 63, sec. 2 ; 30 & 31 Vic. ch. 3, sec. 129 ; *Pomeroy's Sedgwick's Statutory Law*, 2nd ed., 89, *et seq.*

5. And the copyright secured to the respondent by the said Imperial Acts being personally situate in England, could not be affected by colonial legislation either before or since confederation : 5 & 6 Vic. ch. 45, sec. 25 ; *Re Goodhue*, 19 Gr. 366 ; *Pomeroy's Sedgwick's Statutory Law*, 2nd ed., 57, 58.

6. All that the Colonial Legislature could do or has ever done is to prescribe the terms and conditions of a copyright valid within the colony alone, and to afford the necessary protection to such a copyright.

Such colonial copyright, independent of and different from the Imperial copyright, secured by 5 & 6 Vic. ch. 45, has existed in Canada ever since 1841 : 4 & 5 Vic. ch. 61 (1841) ; 10 & 11 Vic. ch. 28 (1847) ; Consol. Stat. C. ch. 81 (1858) ; 31 Vic. ch. 54 (1868) ; 38 Vic. ch. 88 (1875).

7. No additional power to legislate in reference to copyrights was given to the Parliament of the Dominion of Canada by the British North America Act, 1867 : 14 Geo. III. ch. 83, sec. 12 ; 31 Geo. III. ch. 31, sec. 1 ; 3 & 4 Vic. ch. 35, sec. 3 ; 30 & 31 Vic. ch. 3, secs. 91, 129.

8. The view expressed in the last answer is strengthened by the following consideration, viz. :—

The Dominion Copyright Act of 1868 was reserved for and obtained the assent of Her Majesty in Council before it was passed.

The Order in Council assenting to the said Act, recognizes by implication the 5 & 6, Vic. ch. 45, as in force in Canada ; and the Parliament of Canada, since the British North America Act, 1867, has also recognized the previous Imperial legislation relative to copyright as still in force in Canada : 31 Vic. ch. 7, schedule C. (Ca.) p. 150 ; 31 Vic. 56 (Ca.)

9. The respondent's rights are not in any way affected



by the Canadian Copyright Act of 1875, and the Imperial legislation in reference to it.

The Copyright Act of 1875 either repeals the Acts under which the respondent has acquired copyright, or it does not. If it does, the respondent's rights are preserved by the final saving clause: 38 Vic. ch. 88, sec. 30. If it does not repeal such Acts the respondent's copyright continues unimpaired.

10. The Copyright Act of 1875 (38 Vic. ch. 88,) required to be confirmed by Imperial legislation (38 & 39 Vic. ch. 53), since it was repugnant to the Imperial Order in Council of 7th July, 1868, and therefore void: *Canada Gazette*, 24th September, 1868; 38 Vic. ch. 53, sec. 5 (Imp. Stat.) preamble; 28 & 29 Vic. ch. 63, sec. 2 (Imp. Stat.)

11. The Copyright Act of 1875 (38 Vic. ch. 88,) was intended for the protection of authors, not of publishers, and in order to induce those who have already an Imperial copyright under 5 & 6 Vic. ch. 45, to conform to the further provisions of the Canadian Act, it secures to them, in the event of their doing so, that protection against the importation into Canada of foreign reprints of their works, which they had not under the Imperial Act of 5 & 6 Vic. ch. 45, as modified by 10 & 11 Vic. ch. 95: 38 Vic. ch. 88 (Ca.), secs. 4 (1), 15 (2); 38-39 Vic. ch. 53, sec. 5 (Imp. Stat.); 38 Vic. ch. 88 (Ca.), sec. 11.

12. The respondent's bill is sustained in law, and the respondent is entitled to the relief given, and the injunction granted does not exceed the jurisdiction of the Court, inasmuch as it is a personal order, directed against the appellants, who reside within the Province of Ontario.

13. The respondent relies on the reasons given by the learned Judge in the judgment appealed from in this case, together with the arguments urged by the counsel for the respondent, and refers to the authorities cited in the report of this case in 23 Gr. 590.

The case was argued on the 15th December, 1876. (a)

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(a) *Present*.—SPRAGGE, C.; BURTON, PATTERSON, and MOSS, JJ. A.

C. Robinson, Q. C., and J. Beaty, Q. C., for the appellants.  
W. N. Miller and C. W. R. Biggar, for the respondent.

The arguments were the same as in the Court below and sufficiently appear in the reasons for and against the appeal. The following additional authorities were referred to:—

For the appellants: *Farley v. Bonham*, 2 J. & H. 177; *Drummond v. Drummond*,<sup>4</sup> L. R. 2 Chy. App. 45; *Maxwell* on Interpretation of Statutes, 23-4, 145-157; *Ex parte Carruthers*, 9 East 44; *Shortt's Law of Literature*, 45-126; *Hansard* 255 vol. 1, 425.

For the respondent: *Bentley v. Foster*, 10 Sim. 329; *Chappell v. Purday*, 14 M. & W. 320; *Cocks v. Purday*, 5 C. B. 882; *Cassell v. Stiff*, 2 K. & J. 287; *Ex parte Davidson*, 18 C. B. 297; *Coppinger* on Copyright, 72.

March 17th, 1877 (a). BURTON, J. A.—An erroneous impression would appear to prevail as to the powers conferred upon the Parliament of the Dominion of Canada by the British North America Act of 1867, in reference to copyright. That impression may have been strengthened by a remark which fell from the learned Chief Justice of this Court in delivering judgment in *Regina v. Taylor*, 36 U. C. R. 183, which has been referred to in the reasons of appeal as apparently sanctioning that view. I took occasion to state during the argument that although any opinion emanating from that learned Judge was entitled to the greatest respect, the expressions used by him were wholly unnecessary to the decision of that case, and were not concurred in by the other members of the Court.

It is clear, I think, that all that the Imperial Act intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it has transferred the power to deal with banking, bankruptcy, and insolvency, and other specified subjects, from the Local

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(a) *Present*.—SPRAGGE, C.; BURTON, PATTERSON, and MOSS, JJ. A.

Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion.

I entirely concur with the learned Vice-Chancellor in the opinion he has expressed, that under that Act no greater powers were conferred upon the Parliament of the Dominion to deal with this subject than had been previously enjoyed by the Local Legislatures.

By the 29th section of the Imperial Act, 5 & 6 Vic. ch. 45, that Act is extended to every part of the British Dominions, and it was unsuccessfully contended in *Routledge v. Low*, L. R. 3 H. L. 100, that Canada, having a Legislature of her own, and not being directly governed by legislation from England, was not included in these general words.

The 15th section of that Act prohibits Her Majesty's colonial subjects from printing or publishing in the colonies, without the consent of the author (whatever may be their colonial laws), any work in which there is copyright in the United Kingdom.

The same Act prohibits the importing into any part of the British possessions any foreign reprint of any book first written or published in the United Kingdom, entitled to copyright therein.

This Act was subsequently amended by the 10-11 Vic. ch. 95, and it was then provided that in case the Legislature of any British possession should be disposed to make due provision for securing or protecting the rights of British authors in such possession, and should pass an Act for that purpose, and transmit the same to the Secretary of State, and in case Her Majesty should be of opinion that such Act was sufficient for the purpose of securing to British authors reasonable protection within such possession, it should be lawful for Her Majesty to express her royal approval of such Act, and thereupon, by order in council, to suspend, so long as the provisions of such Act should continue in force in such colonies the provisions of the 5 & 6 Vic. ch. 45, *against the importing, selling, or exposing for sale foreign reprints of British copyright works.*

The Canadian Act, 31 Vic. ch. 56, D., was accordingly passed with the object of giving such reasonable protection to authors, and upon its being approved of and assented to by Her Majesty, she did by order in council suspend those provisions of the 5 & 6 Vic., which related to the importing or selling of foreign reprints.

At this time then, and up to the time of the coming into operation of the recent Act, 39 Vic., the Act of 1875, the 5 & 6 Vic., as modified by the order in council, was in full force within this Dominion,—in other words, no one was at liberty, without the consent of the owner of the copyright, to print or reprint the subject of that copyright in any part of the Dominion.

It was conceded that if the Colonial Act just referred to (the Canadian Act of 1875) had been reserved for and had received the Royal Assent in the usual way, it could not have the effect of repealing the 5 & 6 Vic.; but it was contended that inasmuch as it had been confirmed by an Act of the Imperial Parliament, it must be regarded as having the force of an Imperial Statute, and that being, as it was contended, inconsistent with the former Act, it must be held to have impliedly repealed it.

But on referring to the Imperial Act we find the reason, and the only reason, alleged for its passage to be the assumed repugnancy of the reserved bill to the orders in council of 1868. Those orders and the modifications which they effected in the provisions of the 5 & 6 Vic. are referred to in the preamble, and after reciting that a bill respecting copyrights had then been recently passed by the Parliament of Canada, whereby provision was made (subject to such conditions as in the said bill mentioned) for securing in Canada the rights of authors in respect of matters of copyright, *and for prohibiting the importation into Canada of any work for which copyright under the said reserved bill had been secured*, it is declared to be expedient to remove the doubts which had arisen as to whether a mere assent would make the bill operative as against the orders in council, which had the force of statutory enactments, and it



was therefore desirable to confirm the bill by Imperial Legislation.

It is scarcely reasonable to suppose that if the Imperial Parliament had thought fit to accept the Canadian enactment as a substitute for the 5 & 6 Vic., they would not have repealed it so far as it affected Canada in express terms, or that when stating a reason for Imperial Legislation they would have confined themselves to a reference to the order in council which dealt only with a portion of the prohibitions referred to in that statute.

I am of opinion therefore that they have stated the only reason which rendered it expedient to seek a confirmation of the Provincial Act, and that it was intended to preserve intact so much of the Imperial Act as prohibits the printing of a British copyright work in Canada, but giving to the author a further right on certain conditions of securing a Canadian copyright, and thus preventing the importation into Canada of foreign reprints.

Some reference was made upon the argument to the language used by the Secretary of State for the Colonies in introducing the bill. I apprehend that in this as in the case of any ordinary enactment little or no weight could be attached to the language or opinions of individual members of the Legislature or Government, even if there were any mode of bringing that language under our notice judicially; but if it were allowable to refer to the remarks of Lord Carnarvon when introducing the measure, I should say that it seems to favour the view which I have expressed. As reported in *Hansard*, 255 vol. 425, he says the bill did two things. 1. It affirmed the principle that copyright in England should carry copyright in Canada. 2. It would make the owner of an English copyright secure of a copyright for 28 years in Canada on condition of publishing there, by which I understand him to mean that, whilst under the English law the author could prevent the printing in Canada, being still subject however to be driven from the Canadian market by foreign reprints, he could, by availing himself of the Canadian Act, make his copyright perfect, as he would

thereby acquire the additional right of preventing the importation of foreign reprints.

For he says in a subsequent part of his speech: "The bill is a compromise. He believed most authors and publishers would avail themselves of it. Those who did not wish to do so would keep themselves under *the existing law*, and take their chance of what they might receive under the  $12\frac{1}{2}$  per cent. ad valorem duty."

For these reasons I think the decree made by the learned Vice-Chancellor was correct, and that the appeal should be dismissed with costs.

Moss, J. A.—I confess that it is not without reluctance that I have arrived at the same conclusion. I fear that the state of the law which we find inflicts a hardship on the Canadian publisher, while it confers no very valuable benefit upon the British author. Its effect, if I rightly understand the matter, is to enable the British author to give an American publisher a Canadian copyright. It is no very violent assumption that every American publisher, who treats with a British author for advance sheets of his work, will stipulate for the use of the author's name to restrain a Canadian reprint. By this arrangement he will be enabled to secure the practical monopoly of the Canadian market, for which he may be induced to pay the author some consideration; but however small this consideration may be, I apprehend it will be found sufficient to induce the author to concede the privilege rather than secure Canadian copyright by treating with the Canadian publisher. But I need scarcely remark that the possible or probable effect upon a branch of industry, however valuable or important, cannot affect the interpretation which the Court is bound to place upon the statutes by which the subject is governed.

It was contended in the Court below, and stated as one of the grounds of appeal, that by the British North America Act the exclusive right to legislate in relation to copyright was vested in the Parliament of Canada, and that consequently the Canadian Copyright Act by its own

intrinsic force superseded the Imperial Act of 1842. This point was not pressed in argument by the learned counsel for the appellants, but was simply suggested for consideration out of deference to the language used by his Lordship, the Chief Justice of this Court, in *Regina v. Taylor*, 36 U. C. R. 183. I believe that his Lordship did not deliberately entertain the opinion which these expressions have been taken to indicate. He simply threw out a suggestion in that direction, but further consideration led him to adopt the view that the Act did not curtail the paramount authority of the Imperial Parliament, but merely conferred exclusive jurisdiction upon the Dominion Parliament as between itself and the Provincial Legislatures.

It must be taken to be beyond all doubt that our Legislature had no authority to pass any laws opposed to statutes which the Imperial Parliament had made applicable to the whole empire. Now it was settled by the highest authority, that a copyright when secured in England extended to every part of Her Majesty's dominions, including Canada: *Routledge v. Low*, L. R. 3 H. L. 100. Except so far as his rights were affected by the Act 10 & 11 Vic. ch. 95, and the order in council made under its provisions, he was absolutely entitled to the protection of the Imperial Copyright Act. By that Act he had the sole and exclusive right of printing and otherwise multiplying copies of his work in Canada. The Act of 10 & 11 Vic. did not touch the question of Canadian reprints. It only permitted the importation of foreign reprints upon payment of a duty for the benefit of the author. Independently then of the legislation of 1875, it is clear that the respondent was entitled to copyright in this country, with the single limitation that foreign reprints might be imported. It is equally clear that colonial legislation alone could not have affected his rights.

The Canadian Copyright Act of 1875, if adopted by the two branches of the legislature and assented to by the Crown in the usual manner, would have been wholly powerless to abridge his existing right. He would still

have been entitled by virtue of his British copyright to restrain any Canadian reprint.

These propositions, which were scarcely contested in argument, narrow the controversy to a consideration of the true scope and effect of the Imperial Act 38 & 39 Vic. ch. 53, entitled "An Act to give effect to an Act of the Parliament of the Dominion of Canada respecting copyright." Is its effect to make the Canadian equivalent to an Imperial enactment, so that assuming the terms of the Canadian Act itself to be sufficiently wide to have compelled the British author to comply with its conditions before becoming entitled to copyright, if the British Parliament had been divested of and the Canadian Parliament exclusively invested with the legislative jurisdiction, he is now subject to these conditions? Or is its effect merely to remove a real or supposed difficulty in the way of Her Majesty assenting to the bill in the usual manner, without giving to the Act any greater force or operation than if no difficulty had existed and the usual assent been given?

The more I have considered the case and weighed the able arguments addressed to us, the less doubt have I felt upon the answer that must be given to these questions.

The first recital in the Act is a statement of the effect of the order in council of the 7th July, 1868, made under the authority of 10-11 Vic. ch. 95, by which prohibitions against the importation and sale of foreign reprints were suspended so far as regarded Canada. This order, therefore, was the first matter to which the author of the bill deemed it necessary to direct legislative attention with the view to a proper comprehension of the measure; and the recital is confined to the annunciation of the simple fact that such an order existed.

The second recital states that the Senate and House of Commons of the Dominion had passed a bill intituled, "An Act respecting copyrights," which had been reserved. It is obvious that no special inference can be drawn from this recital.

The third states that by the reserved bill provision is



made, subject to such conditions as in the said bill are mentioned, for securing in Canada the right of authors in respect of matters of copyright, and for prohibiting the importation into Canada of any work for which copyright *under the said reserved bill* has been secured.

The significance of this declaration was much debated before us. I do not think that, upon any legitimate principle of construction, it can be held to involve an assertion that a British author is deprived of his rights under the Act of 4 & 5 Vic., and is obliged to subject himself to the conditions of the bill in recital, if he desires to insist upon copyright in Canada. It does no more than state, and so far as it goes correctly state, the purport of the bill. Consider the position of the British author independently of the bill. By the combined effect of the Act 4 & 5 Vic. and the order in council of 1868, he was entitled to a limited copyright in Canada. He could restrain a Canadian reprint, but he could not prevent the importation of a foreign reprint. The bill was to enable him, by compliance with its conditions, to prevent this importation and to secure a perfect Canadian copyright. But there is no trace of an affirmation that if the bill were assented to the author would be compelled to accept its terms. It is not suggested that if he did not desire the complete copyright which the bill offered, its intention was to deprive him of the measure of protection he already enjoyed.

Thus far the recital has consisted of statements of facts. It now proceeds to mention the ground for appealing to Parliament; and that is, that doubts have arisen whether the reserved bill may not be repugnant to the Order in Council, and it is expedient to remove such doubts and to confirm the bill. This is the reason, and apparently the only reason, given for the passage of the enactment. It seems almost equivalent to a declaration that but for the existence of these doubts, Her Majesty would have dealt with the bill without any reference to the Legislature.

Nor can I find in the enacting clauses any support for the appellants' contention. It is not declared that the

Canadian Act shall have the effect of an Imperial Statute. It simply empowers Her Majesty to signify her assent, if she should be so pleased, and enacts that, if Her assent is given, the bill shall come into operation at such time and in such manner as shall be directed by Order in Council. It thus carries out the theory that legislative action was only sought to remove the supposed impediment to executive action.

It was strenuously argued that the terms of the fourth section shewed that copyright in Canada could only be secured under the Act. It declares that where any book in which at the time when the reserved bill comes into operation there is a copyright in the United Kingdom, or any book in which thereafter there shall be such copyright, *becomes entitled* to copyright in Canada, *in pursuance* of the provisions of the reserved bill, it shall be unlawful, without the consent of the owner of the British copyright, to import Canadian reprints into the United Kingdom. The contention is, that this language is repugnant to the notion that the possession of copyright in Great Britain gives any right in this country. I do not think it can be so construed. It certainly implies that the possession of British copyright does not entitle to complete copyright in Canada, as is undoubtedly the case, for it does not prevent the importation of American reprints. But it does not imply that if the author chooses to remain content with the protection offered him by the Act of 4 & 5 Vict., as modified by the Order in Council, he shall not be at liberty to do so.

By the 5th section the Order in Council is expressly preserved in force with regard to books not entitled to copyright in pursuance of the reserved bill. That order, while it removed the prohibition against the importation of foreign reprints, had, of course, left the Canadian publisher under the disability imposed by the Act of 4 & 5 Vict. Under that disability I think he still remains.

I am not prepared to assent to the proposition that we are at liberty to regard the language of Lord Carnarvon

when introducing the question to the House of Lords. But if we were, I agree with my brother Burton, that it does not aid the appellants. On the contrary, I think it is strongly in favour of the respondent's view. His Lordship said pointedly that the reason why he was unable to advise the Crown to sanction the Act passed by the Canadian Legislature without the bill he was then proposing, was, that sanction could not be given by Order in Council to any Colonial bill which was repugnant to an Imperial Statute, and as the Act of 1847 allowed the importation of foreign reprints on payment of a certain duty, the recent Act of the Canadian Parliament was in form repugnant to it. He added that the repugnancy was only technical. It seems clear that, in his Lordship's view, her Majesty might, without any Act of Parliament, have assented to the reserved bill and given it full effect, but for the prohibition it contained against the importation of foreign reprints. But as no Canadian Act, although reserved and assented to by her Majesty, could impair the author's right to restrain a Canadian reprint, which the Imperial Act of 4 & 5 Vict. had given him, it is certain that His Lordship would not have used such language, if he had deemed that this was the effect of the reserved bill. He would undoubtedly have told the House that the necessity for legislation arose from the Act trenching upon the privileges which the Imperial Copyright Act conferred upon the British author.

I agree that the appeal must be dismissed.

SPRAGGE, C., and PATTERSON, J. A., concurred.

*Appeal dismissed.*

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DONALD MCGREGOR FERGUSON, AN INFANT, BY ALLAN,  
GRANT, HIS GUARDIAN, V. THE REV. JOHN FERGUSON.

*Will—Construction—Estate tail—Perpetuity—Restraint on alienation.*

A testator, who died in 1849, devised as follows: "It pleased the Lord to give me two sons, equally dear to my heart. To give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line. To him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground, and the quarter of an acre for a place of worship." (To Duncan, his son, he gave his family Bible and 5s., above what he had done for him.) "To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm, and to answer State dues and publick bindings himself, and the lawful male offspring of his body, until the proper heir are come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber, of whatsoever kind, away off the land, or bringing any other family on to it but his own. But if he leave a situation so advantageous \* \* I appoint Peter McVicar, my grandson, to take charge of the place, farm and all that pertains to it, and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age, as aforesaid."

The testator died in 1849, leaving the land subject to a lease, which expired in 1857. Peter Ferguson, after having gone into occupation, in that year conveyed his interest to Peter McVicar, named in the will, and left the place in the same year. Neither of the testator's sons had any son born during the testator's lifetime. The plaintiff in ejectment, the heir-at-law of Peter Ferguson, the son, claimed that under the will his father took an estate tail, which descended to him. The defendant was the heir-at-law of the testator, and had also a conveyance from Peter McVicar.

*Held*, reversing the judgment of the Queen's Bench, 39 U. C. R. 232, that Peter Ferguson took an estate tail male, with an executory devise over to the first great grandson descending from one of testator's sons in the masculine line: that the condition as to occupation, &c., if it imposed the duty of personal occupation, was void, as being repugnant to that estate: that such estate being destructable by barring the entail, was not an infringement of the law against perpetuities; and that the plaintiff therefore was entitled to recover.

APPEAL from a judgment of the Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the plaintiff in an action of ejectment, and enter a verdict for the defendant, reported in 39 U. C. R. 232. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The following is a copy of the will in question:—

The last Will and Testament of me, Peter Ferguson, senior, to revoke any former wills of mine, being of sound mind, in the merciful providence of Almighty God, being able to write this with my own hand, and by the will of God have become proprietor of one hundred and eighty acres of land, be the same more or less, in the thirteenth Lot of the tenth Concession of the Township of Drummond, District of Bathurst, County of Lanark, Canada West.



In the first place the burying ground on my land I bequeath to myself and family and relatives and as many of the neighbours as will contribute their share to enclose, repair, and keep a good respectable looking fence about it while the world stands. I also make gift of one quarter of an acre, besides the burying ground, to any community of Evangelical Christians in the neighbourhood who may join in brotherly love to build upon it for the true spiritual worship of the true God, but not to retain it for any other. Secondly—it pleased the Lord to give me two sons equally dear to my heart; to give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any encumbrance, except the burying ground and the quarter of acre for a place of worship. To Duncan Ferguson, my son, I bequeath my family Bible and five shillings currency, over and above what I have done for him, with my blessing and prayer for him, that by Grace he will be able to make the best use of his portion, &c. To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm, and answer State dues and publick bindings himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it—painful and humbling thought of him failing—but in case this happening, I appoint Peter McVicar, my grandson, to take charge of the whole place—farm, and all that pertains to it—and occupy the same for his own benefit and advantage, according to the fore-mentioned restrictions and conditions, until the heir be of lawful age as aforesaid. Thirdly—if there be any money to which I may be entitled to at the time of my decease over which I had power of disposing, let it be divided equally to my three daughters and their heirs, after my lawful debts and funeral charges are paid. Fourthly—I do nominate and appoint James Ferguson, son of my brother Robert, and Duncan Ferguson, son of my brother Alexander, and Duncan Ferguson, son of my brother John, and Alexander McVicar and William McVicar, my own grandson, my well beloved, to be the faithful executors of this my last Will and Testament.

The appellant's reasons of appeal were:—

1. The will of Peter Ferguson gave to his second son an estate in the lands in question.
2. The devise to the first great grandson descending from his son by lawful ordinary generation, is void on account of the rule of law as to perpetuities.
3. If the devise referred to in the preceding reason fails, then the devise to Peter Ferguson and the lawful male offspring of his body are sufficient to create an estate tail.
4. The will should be construed so as to avoid an intestacy.
5. Upon the doctrine of *cy près.*, the Court should hold that an estate tail male is given to Peter, the son of the testator, as that will best effectuate the intention of the testator.
6. The clause of the will which provides for Peter

McVicar taking possession, if Peter Ferguson leaves, is void, as being repugnant to the estate of Peter Ferguson, the son.

7. The deed executed by Peter Ferguson to Peter McVicar on the 24th August, 1857, was not registered until 3rd November, 1858, and passed only a base fee, which determined upon the death of Peter Ferguson, and is inoperative to bar his issue.

The appellant will rely upon the following authorities:—*Tud. L. C. R. P.* 531–534; *Douglas v. Congreve*, 1 Beav. 59, 4 Bing. N. C. 1; *Thompson v. Beasley*, 3 Drew. 7; *Jordan v. Lowe*, 6 Beav. 350; *Haddelsey v. Adams*, 22 Beav. at pages 276–277; *Jenkins v. Hughes*, 8 H. L. C. 581; *Key v. Key*, 4 DeG. M. & G. 83; *Marshall v. Grime*, 28 Beav. 376; 2 *Jarman on Wills* 278, 388, 394; *Beaver v. Nowell*, 25 Beav. 555; *McIntyre v. McIntyre*, 7 U. C. R., 156; *Ray v. Gould*, 15 U. C. R. 134; *Edgeworth v. Edgeworth*, L. R. 4 E. & I. App. 41; *Jardine v. Wilson*, 32 U. C. R. 498; *Re Shaver*, 3 Chy. Ch. 380; *Gallinger v. Farlinger*, 6 C. P. 512; *Bradley v. Peinott*, *Tud. L. C. R. P.* 858. Same work, at page 426; *Stackpoole v. Stackpoole*, 4 Dr. & War. 350; *Vanderplank v. King*, 3 Hare 1; the opinion of Mr. Justice Wilson.

The following were the respondent's reasons against the appeal:—

1. The devise to the first great-grandson, &c., is a present not a future gift. If such a great-grandson had been in being at the testator's death, he would have taken the estate absolutely as a vested estate in fee-simple in possession. There was no great-grandson at the death, so the gift failed and an intestacy arose.

2. The rule against perpetuities has no application. There was no intention or attempt to tie up the estate beyond the limit allowed by law. The devisee was to have his estate presently. (See the definition of a perpetuity. *Lewis on Perpetuities*, 164 *et seq.*, quoted in the judgment of the Chief Justice.)

3. The direction of Peter Ferguson is, to occupy till the heir—that is, the devisee—*comes of age to take possession*; that

is during the *minority* of the owner. The intention is evidently that he, Peter, shall take care of the premises during the minority of the devisee, not meddling with the wood or timber or bringing any other family there. The moment the devisee comes of age, he is to have actual possession.

4. The direction to Peter McVicar is in similar terms. He is to *take charge* of the place, and for so doing he is to have the profits for his own benefit; but, as in the case of Peter Ferguson, it is not until the heir *be born* or *come into being*, but until he be of lawful age, that is, during his minority.

5. There is not a word in the will indicating that the devise is future, but the contrary. It is evident that if the great-grandson were in being and of full age at the death of the testator, neither Peter Ferguson nor Peter McVicar was to meddle with the estate, but in the event of his being a minor, they were successively to take care of the property for him during his minority, but they were to have no estate therein, that being in the infant devisee.

6. The devise to the grandson being a *present gift*, it follows that there can be no present gift to Peter Ferguson, otherwise, there would be two gifts of the same property to the same person to take effect concurrently; which is impossible and repugnant. The provisions with respect to Peter Ferguson and Peter McVicar are made upon the supposition that the gift to the grand-child has taken effect, which makes it clear that these persons were to take no estate, but were to be made guardians or caretakers of the property of another during his minority.

7. In the events which happened the devise failed, and in the absence of any residuary devise the estate descended at once to the testator's heir-at-law, neither Peter Ferguson nor Peter McVicar having taken any estate.

8. Even if the devise to the great grandson can be regarded as void for remoteness, the directions with reference to Peter Ferguson and Peter McVicar were ancillary to, and not in substitution for, the principal devise, and must also fail, and cannot be construed as giving any estate in the land.

9. The right of Peter Ferguson, whatever it was, was lost by his abandonment of the occupation of the premises according to the terms of the will. A gift over upon such a condition is good. See *Re Macleay*, L. R. 20 Eq. 186; *Nichols v. Sheffield*, 2 Bro. C. C. 215; *Carr v. Errol*, 6 East 58; *Scarborough v. Savile*, 3 A. & E. 897; *Lockyer v. Savage*, 2 Str. 947; 2 Jarm. 23.

10. The plaintiff showing no title in himself, necessarily fails.

11. The defendant proved title in himself as the heir-at-law of the testator, and by deed from McVicar.

12. For the reasons given, and the authorities cited in the judgment of the Chief Justice of Ontario.

The case was argued on the 20th December, 1876 (a).

*J. Bethune*, Q. C., for the appellant.

*J. Maclellan*, Q. C., for the respondent.

The arguments were the same as in the Court below, and fully appear in the reasons for and against the appeal.

The following additional authorities were referred to:—

For the appellant: *Hawkins on Wills*, 184-5; *Malcolm v. Martin*, 3 Bro. C. C. 51; *Robinson v. Harcastle*, 2 Bro. C. C. 30; *Monypenny v. Dering*, 2 DeG. M. & G. 175; *Sugden on Powers* 498; *Griffith v. Harrison*, 3 Bro. C. C. 410; *Parfitt v. Hember*, L. R. 4 Eq. 446; *Allan v. Markle*, 36 Penn. St. 117.

For the respondent: *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Re McLeay*, L. R. 20 Eq. 186; *McLaren v. Stainton*, 27 L. J. Chy. 442; *Stone v. Parker*, 29 L. J. Chy. 874; *Rabbeth v. Squire*, 19 Beav. 70; *Lewis on Perpetuities*, 72-164.

March 17th, 1877. BURTON, J. A.—The testator, Peter Ferguson, by a will dated 3rd December, 1845, for a reason satisfactory probably to himself, but not very intelligible to most minds, devised his land to the first great-grandson, de-

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(a) *Present*.—BURTON and MOSS, JJ.A; BLAKE and PROUDFOOT, V.CC.



scending from his two sons "by lawful ordinary generation in the masculine line."

To one of these sons he made a bequest, merely nominal if we except his blessing; and to the other he gave the implements belonging to his farm, and as he expresses it, "to occupy the farm and answer State dues and publick bindings himself and the lawful male off-spring of his body until the proper heir are come of age to take possession; but Peter himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on to it but his own; but if he leaves a situation so advantageous and cannot maintain himself upon it, painful and humbling thought of him failing," then Peter McVicar, his grandson, was to take charge of the place, "and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age as aforesaid."

Mr. *MacLennan* contended that it was quite within the bounds of possibility that the great-grandson intended to take the property under the will might be in existence at the time of the testator's death, and that the devise failed simply from the fact of the object of the devise not happening to be in existence at that time; but the language of the will, and the surrounding circumstances point to a different conclusion, and tend to show that he contemplated a future devise to a person to come into existence at a period many years subsequent to his death, and that he intended to provide for the preservation of the property in the meantime by the devise to Peter.

The only possible construction which could give effect to that intention is to construe the devise to Peter as conferring an estate tail, with an executory devise over to the first great-grandson descended from one of his sons.

If that be the true construction, I agree with Mr. Justice Wilson, that the conditions as to occupation and the cutting of timber, &c., are repugnant and void.

The plaintiff then, claiming as heir-at-law of Peter Ferguson, appears to me to be entitled to recover, and the

appeal should be allowed, and the rule *nisi* to set aside the verdict discharged, with costs.

Moss, J. A.—This case adds another to the long list in which a man has answered the question,—Is it not lawful for me to do what I will with mine own? by inditing with his own hand a will, which resembles a curious puzzle rather than a rational disposition of his estate. I think, however, that we can discern, not perhaps with entire clearness, but with some distinctness of outline, the scheme he had formed in his mind, and which he endeavoured to unfold by using words without knowledge. It seems to be reasonably clear—if this statement can be hazarded of anything in the will—that he had so profound a conviction of his natural right to arrange for the ownership “while the world stands,” not only of the burying ground, in which he bequeaths an interest to himself, but of the rest of his property, that he intended to keep the farm in a sort of quarantine until the first-born great-grandson of one or other of his two sons descending in the male line should attain the age of twenty-one. Until then, or at any rate until the birth of this fortunate descendant, there should be no absolute owner of the land on which he set such store, and no plenary successor to himself. In the meantime a temporary enjoyment was to be vouchsafed to others, but not until the third or fourth generation should any one be permitted to succeed to the status which had been given to him “by the will of God” as “proprietor” of this land. So anxious was he to “give equal justice” to the sons, who were “equally dear to his heart,” and not to create heart-burnings by preferring one to the other, that he desired to tie up the ownership of his estate until the birth or majority of a person in whom neither of them could be expected to take a very lively interest. The fortunes of a great-grandson can hardly have been an object of solicitude to Duncan, whose eldest son is stated to have been about fifteen years of age, and still less to Peter, who was then unmarried. There seems reason for conjecturing that the testator’s ruling idea was, that this

cherished property should remain with a Ferguson, at least until the distant time when the great-grandson of one of his sons should have attained his majority. This is indicated by the requirement of descent through the male line, and by the prohibition against Peter's bringing any family but his own upon the place. There is indeed a deviation from this idea, when he provides for the event of Peter McVicar going into possession, but a want of entire consistency in this testator need not cause surprise. As at the date of the will he was a man advanced in years, having a grandson in the female line old enough to be named as executor, and as he knew from the domestic relations of his sons, that a long time must elapse after his death before enjoyment by him whom he intended to be the first absolute owner, he perceived that he ought to provide for the enjoyment of the land in the interval. This benefit he aimed at bestowing upon Peter by the bequest which has been the subject of so much discussion, namely:—"To Peter Ferguson, my son, I bequeath my implements belonging to my farm and to occupy the farm, and answer State dues and public bindings, himself and the lawful male offspring of his body until the proper heir are come of age to take possession; but Peter himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on to it but his own." It may be conjectured that his wish was to enforce a personal occupation by Peter. His further disposition was, that if Peter left a situation which he, still filled with the idea of the eminent value of this farm, styles "so advantageous," Peter McVicar, his grandson, was to take charge and occupy it for his own use and benefit, but subject to the same restrictions, until the attainment of his majority by the great-grandson.

Assuming this to be the notion in the testator's mind, the question is, to what extent (if any) the law will give it effect.

It was argued for the respondent that the language of the will imported a present and immediate gift to the great-grandson upon the testator's death, from which time the will

is to speak, and that there was no reason to suppose that he did not contemplate the possibility of such a person being *in esse* at the time of his death. A calculation was submitted to show that it was not beyond the bounds of possibility, and involved no violation of natural laws, that a man should have a great-grandson living at his decease. It was therefore urged, that this was an immediate devise, which failed, simply because the object did not happen to be in existence when the will became operative, and that as a consequence Peter took no interest, because his occupation and enjoyment were intended for the sole object of protecting the property until the devisee came of age. But I do not think that this appears to be the true interpretation of the will, when its whole scope is regarded—especially in the light shed by the surrounding circumstances to which I have already adverted. It seems to me impossible to suppose that it ever entered into the contemplation of the testator that he might have a great-grandson, descending from one of his sons, alive at the time of his own death. It is clear that he thought there was an equal chance of this object of his bounty being the descendant of either of his sons, for this was the way in which his conscience was juggled “to give them equal justice.” He could not possibly have anticipated a prolongation of his life until the birth of a great-grandson of the then unmarried Peter. The precise idea which he sought to embody in the expression: “To him I will that it pass free of any incumbrance, except the burying ground and the quarter of acre for a place of worship”—is not easy of conjecture. Possibly he might himself have found it difficult of explanation. The suggestion is not without plausibility, that he may have imagined he was thus prohibiting any encumbrance by Peter, and expressing his wish that when the proper time came the property should “pass” to the devisee, that is, become his, without any encumbrance by any person who had previously enjoyed it.

At the trial it was conceded that the gift to the great-grandson was void on the ground of remoteness. The learned Chief Justice after a review of the authorities placed



the same construction upon the gift. But he was of opinion that the will gave Peter no more than a right to take care of the farm until the unborn devisee should be able to take possession, and that this right, being subordinate to the original devise, must fall with it; and that at any rate his interest had been forfeited by his ceasing to occupy the premises. Mr. Justice Wilson was of opinion that Peter took an estate in tail male, and that the limitation of its duration until the great-grandson should come of age and take is inoperative, because that person never can take. He also thought that the attempted restriction upon the mode of enjoyment by Peter was void. The best opinion I have been able to form is, that if the principal devise, as it has been termed, is to be treated as falling within the rule against perpetuities, the latter is the correct view. I agree with the learned Judge in thinking that the failure of the devise would not destroy the estate in tail male conferred upon Peter. I should, therefore, be of opinion that the appellant must succeed, even if the principal devise were void as tending to create a perpetuity. But I must say, with great deference, that that does not appear to me to be the true construction of the will. I do not think that the rule against perpetuities here finds any proper place. In my judgment the will should be read as vesting in Peter an estate in tail male, with an executory devise over in favour of the first great-grandson, descended in the male line from one of his sons. If that be its correct interpretation, the rule against perpetuities is inapplicable. The estate limited to the great-grandson was destructible by the barring of the entail, and the essential feature of indestructibility by those prior in interest being wanting, there is no perpetuity. I proceed then to state the reasons which appear to me to lead to the conclusion that this is the true legal rendering of the instrument. I think it will be found that it does not violate, but harmonizes with, the established canons of interpretation, and most nearly effectuates the intention which we gather from the language of the testator.

In the first place it is clear that in reading the will the

order in which the devises are introduced need not be followed. That to Peter may be read first, and receive the same construction as if it stood at the commencement. In the language of Lord Hardwicke, in *Ridout v. Dowding*, 1 Atk. 419:—"It is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent." In this will the order in which the testator has arranged his dispositions no doubt serves to show that the special and most highly-favoured object of his bounty was his remote descendant; but bearing that in mind, it is legitimate and proper to examine first the devise to Peter, because it is clear that the testator intended him to be the first person, in order of time, to receive any personal benefit from the devised estate. The primary question, therefore, is, what estate or interest does the will confer upon him by entitling him and his lawful offspring to the occupation, until the main object of his bounty should reach his majority. I purposely state the question in these terms, because it seems proper to exclude the factor, that the ownership could not be tied up until the happening of that event, inasmuch as it is to be presumed that the testator had not that rule of law in his contemplation.

It does not seem to admit of much doubt that if the terms of the gift simply were to Peter and the male offspring of his body of the occupation of the freehold, an estate in tail male would be conferred. A devise of the occupation of a house gives an estate for life, and the condition of personal residence is not necessarily annexed, (*Rex v. Inhabitants of Easington*, 4 T. R. 177; *Rabbeth v. Squire*, 17 Beav. 70, & 4 DeG. & J. 406.) Reference may also be made to *Redfield*, vol. i. 430. The extension of the gift to the male offspring enlarges the estate to a tail male. It is as if the gift had been to him and the heirs male of his body. In *Jarman* II. p. 89, the word offspring is said to be synonymous with issue. In *Thompson v. Beasley*, 3 Drew. 7, Kindersley, V. C., held that it was a general word, a *nomen collectivum*, and included grandchildren. There the precise language was, "but if there should not be any child or offspring;"

so that there was strong intrinsic evidence that the testator used the term in a more extensive sense than children. There is no doubt, however, from the observations of the learned Judge that he would have been of the same opinion, if the word had stood alone. The precise point was decided by the Supreme Court of Pennsylvania, in *Allan v. Markle*, 36 Penn. St. 117. This estate tail male is to determine upon the first great-grandson, the *proper heir*, as the testator denominates him, reaching his majority. Upon the happening of this event the limitation to him takes effect. It is therefore an executory devise engrafted upon the estate tail, and is not obnoxious to the rule against remoteness. In this way only, I conceive, can the intention of the testator be in any degree effectuated.

It is abundantly clear that he did not intend to die intestate. Duncan was his heir-at-law, and the terms of the will demonstrate that he considered that this son had already received his full portion. Peter had not received any portion, and as some equivalent the testator intended that he and the heirs male of his body should have at least a partial enjoyment of the premises in question.

If the construction of the will be adopted for which the respondent contends, the result is an intestacy, and neither Peter nor the remote descendant could ever take any benefit under the will. The construction now suggested gives an interest in the land to each. It is true that the estate tail may be barred, and that thus the main object of the devise, namely, the vesting of the estate in the so-called proper heir, may be defeated. So far this is contrary to the testator's intention, or rather it introduces a consequence which he did not foresee. But this is no reason for refusing to place this construction upon the will. The testator has used words which in their ordinary grammatical sense have a defined meaning. The expressions are of a technical or quasi-technical character, and are governed by the rule enunciated in *Doe Winter v. Perratt*, 6 M. & G. 342, that in the judicial exposition of wills technical words, or words of known legal import, are to be considered as having been used in their

technical sense, or according to their strict acceptation, unless the context contains a clear indication to the contrary.

This canon was thus stated by Lord Kingsdown in *Towns v. Wentworth*, 11 Moo. P. C. 526: "When a rule of law has fixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, beyond all doubt, such construction."

It seems to me that this testator has not shewn any indication that the words, "lawful male offspring of his body," are not to be understood in their proper sense. The circumstance that the law has annexed a particular consequence to the estate which the use of these words creates, cannot alter the construction. Any speculation upon his possible intention, or upon his course of action, if he had apprehended the law, is manifestly inadmissible.

Turner, L. J., pointed out in *Broadbelt v. Thomson*, 12 Moo. P. C. 116, that it is upon intention, either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, that the Court feels bound to proceed. This principle of construction is well illustrated by the familiar class of cases in which, by the application of the *cy pres* doctrine, language which ordinarily would be taken to give an estate to a person for life, with remainder to his issue in tail, is construed as giving the first taker an estate tail.

Sir Edward Sugden, in dealing with such a limitation in *Stackpoole v. Stackpoole*, 4 Dr. & War. 349, used language sufficiently apposite to justify its citation: "It is true that, if I adopt this construction, I put it in the power of the son to prevent the estate from going to his sons; for at any time, by pursuing the proper forms, he may bar the estate tail and dispose of the estate as he pleases. But, on the other hand, if I do not adopt that construction, I defeat the intention of the testator, for upon the death of the son the estate will go away to collateral branches of the family, and his issue never can take; whereas, by the other construction, unless the son



bar the entail, the estate will descend to all the issue for whom the testator intended to provide."

In *Parfitt v. Hember*, L. R. 4 Eq. 446, Lord Romilly said that it was true that the law, as incidental to an estate tail, allows any one of the tenants in tail in possession to defeat that intention by disentailing the estate; but that this circumstance did not appear to him to affect the reasoning which entitles the Court to do what, as far as can be allowed, effects the intention of the testator.

It remains to consider whether the departure of Peter from the farm in 1857 worked a forfeiture of his estate. This question is very different from what it might have been if Peter had only a life estate. It is, I think, settled that any attempt by a testator absolutely to restrain the tenant in tail from barring the entail is futile; and a condition in absolute restraint of alienation, or which would practically have that effect, is void as being repugnant to the quality of the estate. This position is not shaken by the judgment of the Master of the Rolls in *Re Macleay*, L. R. 20 Eq. 186, which seems to me fully to recognize the doctrine. The gist of that decision is, that a condition which only imposes a limited restriction upon alienation may be good.

In one passage the learned Judge says: "The condition, therefore, whatever it may be, must not really take away all power, either by express words or by the indirect effect of the frame of the condition." And in another: "So that, according to the old books, *Sheppard's Touchstone* being to the same effect, the test is, whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form."

Now where the condition of personal occupation and use by the tenant in tail is annexed to the gift, it appears to me that if allowed to be valid it amounts in substance to an absolute restriction upon alienation. Everyone knows that a sale or a mortgage, or a lease by the tenant in tail, would thus be rendered practically impossible.

The gift over to the grandson is immaterial. I take it to be settled by authority that if a condition against alienation

annexed to an estate in fee simple or fee tail be invalid, a gift over in the event of alienation cannot be supported. The case of *Ware v. Cann*, 10 B. & C. 433, seems to have been accepted as an authoritative decision upon that point. I am aware that the soundness of that doctrine has been questioned by a learned commentator on the law of Wills, who has taken the ground that the cardinal principle of giving effect to the wishes of the testator would be maintained intact by holding that the estate simply came to an end upon the doing of the prohibited act. In this criticism the duty of the Court to disregard an illegal wish of the testator has probably not been sufficiently regarded. But be that as it may, the rule itself cannot now be disturbed by any authority short of the Legislature.

This is the best construction which, after much consideration, I can put upon this eminently unsatisfactory will. Perhaps the best that can be said for it is that, so far as I can perceive, it does not plainly violate any established canon of interpretation, and is less objectionable than any other that has been suggested. That it is wholly free from difficulty, I do not venture to affirm.

The result is, that the appeal must be allowed, with costs.

PROUDFOOT, V. C.—The testator made his will in the year 1845, and executed a codicil to it in 1849. He must then have been advanced in years, as in the will he speaks of, and appoints one of executors, his grandson; and it was stated in the argument that the defendant, another grandson, was then in existence also. What his age was does not appear; and he died in 1849. His son Peter was not then married. To give his two sons, Duncan and Peter, equal justice, he gives the land to neither, but to the first great grandson descending from them by lawful ordinary generation in the masculine line. I think the fair construction of the intention of the testator was, that he contemplated a future devise to the great grandson; not one that was likely to come into effect at his death.

The whole will must be read to ascertain the order of the

devises, for it is plain that a prior estate may pass by a subsequent clause in the will. Now it appears that the land was under a lease at the time of the testator's death which had nearly eight years to run, and by the codicil he gives all rent due, or what may be due of rent connected with the present leases of his farm, equally amongst his three daughters. The possession of the tenant could not be disturbed, and the rents arising from the lease are thus disposed of. No devisee of the land could take possession till the expiration of the tenancy.

The next provision to take effect in the natural sequence of events is, the clause relating to Peter.

“To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State dues and public bindings himself and the lawful male offspring of his body, until the proper heir are come of age to take possession; but Peter himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous and cannot maintain himself upon it—painful and humbling thought of him failing—but in case this happening, I appoint Peter McVicar, my grandson, to take charge of the whole place—farm and all that pertains to it—and occupy the same for his own use and benefit, according to the forementioned restrictions and conditions, until the heir be of lawful age as aforesaid.”

The meaning of this clause has, from its obscure phraseology, been the subject of much difference of opinion in the Courts below. The conclusion I have come to is, that it passes an estate in tail male to Peter.

In *Cook v. Gerrard*, 1 Saund. 180, a testator devised, “that my loving wife dame Elizabeth have the free use of my manor house called Spaynes-Hall, with the orchard and garden thereunto belonging, for the space of one whole year next after my decease,” and it was held that the interest in the land passed for a year; for the free use passes a right to take the profits for the time limited by the will. And in

*Doe v. White*, 1 East. 33, where a testator "gave unto Ann White, his sister-in-law, £20, and the income of Burge's cottage, and her living in it if she thought proper, during her natural life," it was held that Ann White took an *estate for life*.

To have the *free use*, and to *have the income of a cottage and her living in it*, are not more powerful phrases than that used in this case, *to occupy*, and the occupation is not only to be that of Peter, but of his issue in tail male, so that if an estate passes it must be such an estate tail; and, indeed, I understood that to be conceded on the argument.

It was said, however, that the estate was subject to a condition requiring personal occupation by Peter, which he had not done, and therefore that his estate was forfeited.

In *Rabbeth v. Squire*, 19 Beav. 70, 77, S. C. 4 DeG. & J. 406, a testator gave to his two sons, after the death of his wife, if it were their desire, the joint use and occupation, or they might divide the same as they could agree, of all his marsh lands during their joint natural lives; and if either of them declined such use and occupation, the other should have the whole, the sons paying rent for the same at the rate of £1 per acre, and paying all manner of taxes and assessments for the same. One son let his portion, and on the death of the other, he let the whole. The Master of the Rolls, first, and afterwards the Lord Chancellor (Chelmsford), held that personal use and occupation was not required.

In *Fillingham v. Bromley*, T. & R. 530, the testator gave to his nephew an estate called *Juts* for life, and after the determination of that estate by forfeiture or otherwise \* \* to the first and other sons of the nephew successively in tail male \* \* it being his will, and he did thereby direct that the person entitled to *Juts* should not set, let, or lease out the said estate, and that every such person should *live and reside* on that estate, and for default he gave the estate over. The nephew and his eldest son suffered a recovery of the estate, and afterwards sold it to the plaintiff. The plaintiff agreed to sell to the defendant, and filed a bill for specific performance.



On reference to the Master to inquire whether a good title could be made, it appeared that the nephew had not resided and lived continuously upon the estate, but the Master reported in favour of the title. The Vice-Chancellor decreed specific performance.

Upon appeal Lord Eldon affirmed the decree: "Then comes the question, what is living and residing? There are many purposes for which the word inhabitant has been taken to include persons as inhabitants of places in which they never were. The question comes to this, what it was the testator meant, and whether, unless a clear meaning can be put upon the will, the Court is to take upon itself to say that there has been a forfeiture." And on a subsequent day he was of opinion that the title was good.

This is a case of peculiar value, for it was for specific performance, in which it is not usual to force a doubtful title on a purchaser.

*Bull v. Sibbs*, 8 T. R. 327, shews that a person may occupy lands without residing on them. It was an action for use and occupation. The defendant had agreed to take the land from the plaintiff, and afterwards sub-let it. He had not occupied it himself. The Court held that an occupation by the tenant of the defendant was the occupation of the defendant.

The conditions attached to Peter's estate, if they are to be construed as imposing the duty of personal occupation, and preventing the giving away of wood and timber, and prohibiting any other family being brought on the place, would seem to interfere with the right of alienation, and be thus repugnant to the nature of the estate, and therefore void.

The right of alienation is as much incident to an estate tail as to an estate in fee, and any condition or proviso prohibiting or restraining it is repugnant and void: *Tudor's L. C.* 358, 795; 2 *Jarm. Wills* 14, *et seq.*; *Ware v. Cann*, 10 B. & C. 433. This is the rule even where there is a devise over on breach of the conditions: *Ware v. Cann*, *supra*.

In the Court of Queen's Bench the devise to the great grandson seems to have been treated as void for remoteness.

and tending to create a perpetuity. In this the Chief Justice was quite correct, if he was correct in holding that Peter took no estate. But if Peter took an estate tail, I am unable to see how the devise sins against the law in regard to perpetuities.

The definition of a perpetuity, as given by Mr. Lewis (on Perpetuity, 164), requires that the estate should not be destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation. But how can that apply to a limitation after an estate tail? It is of the very essence of an estate tail that a recovery suffered by the tenant in tail, or now a statutory deed, bars all the estates in remainder. Thus where there is a limitation over after an estate tail, inasmuch as the tenant in tail, by resorting to the usual mode of barring an estate tail, can defeat the limitation over, it does not come within the danger of a perpetuity, and is therefore valid. As where there was a proviso in a will by which an estate tail was made to cease and go over to another person upon the tenant becoming seized of other estate. "No rule of law," said Sir Lloyd Kenyon, M. R. "is contradicted by it; and if no recovery were suffered, it might take place at any distance of time. I might as well be told that an estate tail is an illegal estate, because it may endure for ever." *Nichols v. Sheffield*, 2 Bro. C. C. 235. A collection of similar cases may be found in *Tudor's L. C.* 364 *et seq.* in the notes to *Cadell v. Palmer*.

The deed from Peter Ferguson to Peter McVicar having become inoperative for want of registry within six months, and perhaps for other reasons, forms no impediment to the plaintiff's title.

I am therefore of opinion that the judgment of the Court of Queen's Bench should be reversed, and the appeal allowed, with costs.

BLAKE, V. C.—I think that Peter Ferguson took under the will in question an estate tail male, and that the present plaintiff, as his heir, is entitled to possession of the premises.

Peter Ferguson was to have not only the charge of the premises, but a beneficial enjoyment thereof for himself and "the lawful male offspring of his body." I can find no construction of the will entirely satisfactory to my mind, but I am of opinion that there is less objection to the above conclusion than to any other which can be suggested.

I think the appeal should be allowed, with costs.

*Appeal allowed.*

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### COCKBURN V. SYLVESTER ET AL.

*Warehouse receipts—What constitutes a debt—C. S. C. ch. 54, and 24 Vic. ch. 23.*

The plaintiff accepted two accommodation bills for one C. on the 29th June, 1874, and C. procured a warehouse receipt for coal from the defendants, dated on the same day, which he endorsed to the plaintiff by way of security. In an action on this receipt for non-delivery of the coal *Held*, reversing the judgment of the Common Pleas, 27 C. P. 34, which followed *Re Coleman*, 36 U. C. R. 559, that the plaintiff could not recover, for there was no debt contracted from C. to the plaintiff at the time of the endorsement of the receipt, within the meaning of C. S. C. ch. 54, sec. 86, and 24 Vic. ch. 23, the liability incurred by C., to indemnify the plaintiff against these acceptances not constituting a debt until default made by C.

*Macnee v. Gorst*, L. R. 4 Eq. 315, 15 W. R. 1198, distinguished.

APPEAL from the judgment of the Common Pleas, discharging a rule *nisi* to set aside the verdict for the plaintiff, reported in 27 C. P. 34. The pleadings and facts fully appear there and in the judgments on this appeal.

The appellants' reasons of appeal were :—

1. The transaction out of which these proceedings arose is a matter coming within a class of subjects in respect of which the legislative authority is vested by the Confederation Act in the Parliament of Canada. The laws existing at the date of Confederation in the several provinces relating to such subjects, or classes of subjects, in respect of which

the legislative authority was vested in the Parliament of the Dominion, remain in force only until the Parliament of the Dominion shall amend, repeal, or substitute other legislation in their stead. The effect of the Statute of Canada, 34 Vic. ch. 5, is, by providing a general law for the Dominion, to supersede Consol. Stat. C. ch. 54.

2. That no property in any coal, either in any specific 400 tons, or in any undivided aliquot part thereof, passed from Coleman to the plaintiff.

3. There was no debt due within the meaning of Consol. Stat. C. ch. 54, sec. 8; and the decision of the Court of Queen's Bench in *Re Coleman*, 36 U. C. R. 559, is erroneous. *Ex parte Sturt*, L. R. 13 Eq. 309.

4. The evidence does not disclose any sufficient demand or presentation of warehouse receipt.

5. The action is too late, not being brought within six months from the date of the transfer of the warehouse receipt; and there was no demand, or waiver of demand, or other proceeding sufficient to save the plaintiff's rights: Consol. Stat. C. ch. 54, sec. 9.

6. That upon the evidence the verdict should not have been increased.

The following were the respondent's reasons against the appeal:—

1. The Act, ch. 54, Consolidated Statutes of Canada, which embraced and consolidated the provisions of 22 Vic. ch. 20, intituled: "An Act granting additional facilities in commercial transactions," has never been expressly repealed; and the rights granted thereby to private persons have not been interfered with by subsequent legislation, professing to deal only with the general banking law of the Dominion.

2. The defendants are estopped from denying the plaintiff's property in the specific quantity of coal, and that they had the quantity in question at the time the receipt was given. *Coffey v. Quebec Bank*, 20 C. P. 110, 555.

The objection that no property in any coal passed to the plaintiff, is inapplicable to the 1st and 2nd counts of



the declaration, and the verdict is sustainable on those counts.

3. There was a debt within the meaning of the Act. *In re Coleman*, 36 U. C. R. 559.

4. There was sufficient evidence of demand. The defendants did not deliver the coal to the plaintiff because it was in possession of Coleman's assignee, and not because the plaintiff did not actually produce the warehouse receipt.

5. The coal was demanded within six months from the date of the warehouse receipt, and from its transfer to the plaintiff, which is all that is necessary; and the provisions of section 9 C. S. C. ch. 54, prohibiting goods being held in pledge for any period exceeding six months, do not affect the plaintiff's right of action.

6. The verdict was properly increased.

The plaintiff refers to and relies upon, the judgment of the Court below.

The case was argued on the 15th December, 1876 (a).

*D. McMichael*, Q. C., with him *N. G. Bigelow*, for the appellants.

*J. Bethune*, Q. C., for the respondent.

The arguments were the same as in the Court below, and fully appear in the reasons for and against the appeal.

March 17th, 1877. BURTON, J. A.—This action was brought to recover damages for the non-delivery of 600 tons of coal, for which the defendants had granted a warehouse receipt to one Coleman, who endorsed and transferred it to the plaintiff to indemnify him for his acceptance of two bills drawn by Coleman on the plaintiff, both dated on the 29th June, 1876, one for \$1,500, at 100 days, the other for \$900, at 70 days.

Before the transaction was actually carried out, the plaintiff had consented to accept, upon Coleman's giving the warehouse receipt. The receipt was subsequently brought to him by Coleman, dated the 27th June, and bearing his

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(a) *Present*.—SPRAGGE, C.; BURTON, PATTERSON, and MOSS, JJ. A.

(Coleman's) endorsement, and was delivered to the plaintiff on the 29th June, simultaneously with the acceptance.

The plaintiff recovered a verdict, which was subsequently moved against, and a rule *nisi* granted upon a number of objections which were taken at the trial, which rule was afterwards discharged by the Court of Common Pleas; and against that decision this appeal is brought; but it is unnecessary, in the view which we all take of one point, to consider the other questions which were urged at the trial and in the Court below; as, if the conclusion we have arrived at upon that point be correct, it is fatal to the plaintiff's recovery.

That point, shortly stated, is, that there was no debt contracted at the same time with the transfer, within the meaning of the Consol. Stat. C. ch. 54, sec. 8, and 24 Vict. ch. 23.

The first of these enactments, omitting those portions which relate to banks (which have no bearing on the present case) would read as follows:—

“Any bill of lading, any specification of title, or any receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares, or merchandize, stored or deposited, or to be stored or deposited in any warehouse, mill, or other place in the Province, &c., may by endorsement thereon by the owner or a person entitled to receive the same, be transferred to any private person or persons as collateral security for the due payment of any debt due to such private person or persons; and being so endorsed shall vest in such private person from the date of such endorsement all the right and title of the endorser to or in such cereal grains, goods, wares, or merchandize, subject to the right of such endorser to have the same re-transferred to him if such debt be paid when due.”

The section then provides for the indorsee realizing his debt by sale, if the debt be not paid when due; and section nine declares that no transfer shall be made under that Act to secure the payment of any debt, unless such debt be contracted at the same time with the endorsement of such bill of lading or receipt.

The 24 Vic. ch. 23 amends the Consolidated Act by providing, *inter alia*, that *all advances*, made on the security of such receipts, shall give to the person making such advances a claim for repayment thereof by preference over the claim of any unpaid vendor.

The receipt, we may assume, was endorsed to the plaintiff on the 29th of June, the day on which he gave to Coleman his acceptance; and the question is, did the liability then incurred by Coleman, to indemnify him against these acceptances, constitute a debt within the meaning of the statute.

Mr. Justice Wilson, in considering this question in an application to the Queen's Bench growing out of the insolvency proceedings against Coleman, evidently struggled to prevent the injustice which a contrary conclusion might cause, and inclined to hold that by a liberal construction of the enactment, it might be brought within it. But, although he had felt much doubt upon it, he eventually came to that conclusion, believing that he was supported in that view by a decision of Page Wood, V. C., in a case under the Factors' Act: *Macnee v. Gorst*, L. R. 4 Eq. 315.

The language used by that learned Judge as reported *there*, is not, at first sight, very intelligible, but it will not be found, I think, on examination, to support the view contended for. Under the Factors' Acts, the agent entrusted with the possession of goods for sale is entitled to pledge them for advances *bonâ fide* made on the security thereof, and the Vice Chancellor there held, that where a party has come under an obligation to pay in the event of his principal making default, a pledge of goods, given by the principal to the surety, in order to induce him to make the payment and to secure him for it, could not be regarded as a security for a present advance, within the meaning of that Act. The payment was made by the surety to relieve himself of the obligation previously incurred; and therefore was contrary to the spirit and intent of the Factors' Act, which was intended to apply only to such present cash advances as should be made *bonâ fide*, simultaneously

with the pledge. My brother Patterson called my attention to a much better report of the case in 15 W. R. 1198.

All that the case establishes, however, is, that a payment so made is not an advance within the Act; but inferentially decides that there is no debt from the principal to the surety, under circumstances similar to those in the present case, until the principal has made default.

The acceptance here, having been given by the plaintiff at the request of Coleman, and for his accommodation, there was, in point of law, an implied request from the latter to the plaintiff to intervene on his behalf if he made default; and money paid by him for the purpose of discharging the acceptance when due would be money paid for the use of Coleman at his request. But it was not a debt until default; and it was quite possible that no debt would ever arise; nor could the plaintiff accelerate the liability of Coleman by payment before maturity. If he paid previously, being under no legal obligation to pay, it would have been a voluntary payment, and would have afforded no ground of action against Coleman.

I think therefore that the debt in this case was not contracted at the time of the endorsement of the receipt, and that no property passed under it to the plaintiff.

No doubt the plaintiff might, as Mr. Justice Wilson remarks, have required, and rightly taken, security to indemnify himself against the chance of having to pay this amount; and it is much to be regretted that he had not done so; but I do not agree in the learned Judge's suggestion that it was a claim which might have been proved under the Insolvent Act; it was not a debt coming within the definition of *debitum in presenti solvendum in futuro*, nor a debt upon a contingency; it was not a debt at all, although it was quite possible, as the result shows, that a debt might arise from the plaintiff's granting the acceptance, and being afterwards compelled to pay it.

I much regret that we are compelled to come to this conclusion. It is unnecessary, in this view of the law, to consider the other objections; but on the broad ground that the



transfer was not made in compliance with the terms of the statute, I think the plaintiff cannot hold his verdict, and that the rule should be made absolute to enter a nonsuit.

PATTERSON, J. A.—The plaintiff, on 29th June, 1874, accepted two accommodation bills for Coleman, one for \$1,500 at 100 days, and one for \$900 at 70 days; and Coleman, by way of security, procured from the defendants a warehouse receipt for coal, dated 27th June, 1874, and endorsed it to the plaintiff. The action is brought upon that receipt. The plaintiff's title depends on his coming within Consol. Stat. C., ch. 54, secs. 8, 9.

Section 8 provides that a receipt, given by a warehouseman for goods stored in a warehouse or other place, may, by endorsement thereon by the owner of the goods, be transferred to a bank or to any person for such bank, or to any private person, as collateral security for the due payment of any bill of exchange or note discounted by the bank, or *any debt due to such private person*; and, being so endorsed, shall vest in the endorsee the right of the endorser to the goods, subject, &c.

Section 9: But no transfer of any such receipt shall be made to secure payment of any bill, note, or debt, unless negotiated or contracted at the same time with the endorsement of the receipt.

I agree that it is impossible to hold that a debt was contracted from Coleman to the plaintiff. No actual debt could arise out of the transaction until the plaintiff had paid the bills or some part of them; and in the meantime the form of the bills imported a debt due from the plaintiff to Coleman.

It has been argued that "debt" may be read as meaning "duty": that in effect the duty which Coleman undertook, to pay the bills, and thus to prevent any money debt from accruing from him to the plaintiff, was itself a debt which, under the statute, could be secured by the mode of conveyance which the statute instituted.

I think this would be giving a construction to a word of common use in business matters, used in a statute dealing

entirely with commercial law, which neither the necessary force of the word itself, nor the design of the law, nor the context requires or makes legitimate.

The Court of Common Pleas, in the judgment appealed from, merely followed the judgment of the Queen's Bench upon this same transaction in *Re Coleman*, 36 U. C. R. 559. The strong doubts expressed in the judgment in that case, of the propriety of holding that a debt was created from Coleman to the plaintiff, by the acceptance by the latter of accommodation bills drawn upon him by the former, were resolved in favour of the construction adopted, upon the authority of language used by Lord Hatherley, when Vice Chancellor, in *Macnee v. Gorst*, L. R. 4 Eq. 315. Any doctrine laid down by so high an authority, touching the construction of a statute which dealt with a branch of the same general subject of commercial law, might well be accepted as decisive when the balance was still oscillating between two opinions. But I do not understand the dictum as importing the view for which it was cited. Goods had been pledged on the 17th of October by Hodgson to Gorst, who could only maintain his right to hold them by force of the provisions of the Factors' Act; and it was essential for him to show that the debts, which the goods were pledged to secure, were not antecedent debts. As to one of the three separate debts which were in question there was no difficulty. The contest was respecting the other two. For one debt of £2,709, Hodgson had accepted a bill, which was not due till the 23rd of October. The finding of his Honour as to this was that Hodgson owed Gorst £2,709 for which he accepted the bill; and he said, p. 322: "The bill was not due till the 23rd of October, and this transaction took place on the 17th; but, I apprehend, that makes no difference. If a bill is given to secure an antecedent debt, though the bill is not actually due at the time the pledge is made, yet, if the pledge is made for the purpose of taking up that bill, it is made for the purpose of paying that antecedent debt which the bill was intended to cover." The other transaction he also decided on the ground that an antecedent debt existed.

The passage relied on in the judgment below is not very easily understood, as reported in the Regular Reports, from which it is quoted. The language as given in the Weekly Reporter, 15 W. R. 1198, is more intelligible. When it is read with a knowledge of the facts, and of the actual decision in the case, one readily sees the meaning to be that, although the relation of principal and surety creates no debt from the principal, until he has made default and the surety has been called upon to pay, yet if the surety, in anticipation of his liability, relieves himself by paying the debt, he becomes, by that act, a creditor of his principal; and a pledge afterwards given, although given before the original obligation would have matured, is given in respect of an antecedent debt.

The dictum is really in affirmance of the appellants' contention that no debt is created by the mere making of the accommodation paper.

I agree that the appeal must be allowed with costs.

SPRAGGE, C., and MOSS, J. A., concurred.

*Appeal allowed.*

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## RE SMITH &amp; Co., INSOLVENTS.

*Insolvent Act, 1875—Remuneration of Assignee.*

An offer by a creditor to purchase the estate at 20 cents in the \$, exclusive of the claim of the Bank of Toronto, was accepted. The bank was fully secured by the purchaser's endorsement.

*Held*, affirming the decision of the County Court, that the assignee was not entitled to a commission on the bank's claim.

THIS was an appeal from a decision of the Judge of the County Court of Victoria, reducing the claim for remuneration of the assignee, by the sum of \$1,186.28.

A writ of attachment issued against the insolvents on 3rd June, 1876, to the appellant, an official assignee.

Claims were proved as follows:—

The Bank of Toronto .....	\$95,981.30
The Merchants Bank .....	48,625.63
R. C. Smith .....	15,425.79
Other Creditors to the extent of .....	27,391.61

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Amounting in the whole to ... ..\$187,424.33

And at a meeting of creditors held on the 8th August, the petitioner was appointed assignee to the estate.

At a subsequent meeting on the 21st September, 1876, the following resolution was moved by Mr. R. C. Smith:—

“Robert Charles Smith offers to purchase the whole of the estate of the insolvents as a firm, and the several individual estates of the separate partners, at and for such a sum of money as will realize to the unsecured Canadian creditors 20 cents in the \$ of the principal sum of their claims, as they shall be proved and established according to law, it being understood that the above offer of 20 cents in the dollar shall not apply or extend to the claim of the Bank of Toronto, that bank consenting hereto. This offer to embrace the payment by R. C. Smith in full of all preferential claims, &c.”

This offer was accepted, and the assignee directed to take steps to carry out the arrangement, and convey the estates



to Mr. Smith. The only creditors opposing the resolution were the Merchants Bank ; but there were not creditors sufficient in amount, exclusive of the Bank of Toronto, to carry the resolution, so that it was in fact carried by their vote.

In point of fact the Bank of Toronto held the security of R. C. Smith, the purchaser, for the whole of their indebtedness.

The appellant's reasons of appeal were as follows:—

1. The claim of the Bank of Toronto was paid by the estate, and the amount thereof was part of the net proceeds, within the meaning of the Insolvent Act of 1875.

2. The creditors of the estate had no power by any resolution they could pass to curtail or decrease the commission of your said petitioner, that being fixed by the said Insolvent Act.

The case was heard before BURTON, J. A., sitting alone in Insolvency.

March 6, 1877, *J. K. Kerr*, Q. C., for the appellant.

*S. Richards*, Q. C., for the respondents.

March 9th, 1877. BURTON, J. A.—I assume that a commission has been paid to the assignee upon such a sum as 20 cents on the claims other than that of the Bank of Toronto would amount to, and also upon those preferred claims which are referred to in the resolution.

It was contended before the County Court Judge that the debt due the Bank of Toronto was paid by the estate, but Mr. Kerr, perhaps feeling that the claim is untenable in that shape, contended before me that the value of the estate less the incumbrances, as shown in the insolvent's statement of assets and liabilities, must, under the circumstances of this case, be regarded as the net proceeds of the estate, upon which the assignee is entitled to a commission, under the 43rd sec. of the Act ; but I cannot accede to that view, as I think the offer here made must be looked upon in the same way as if Mr. Smith had made an offer of a certain fixed sum, which he had previously arrived at by taking the

provable claims (other than that of the bank) and computing the amount at 20 cents on the \$. The creditors were willing to accept that, and, although, from the accident of the purchaser being also the endorser, he and the bank are enabled to carry out the arrangement against the wishes of some of the creditors, that is what is occurring every day in the settlement of insolvent estates, the Legislature leaving it to a certain majority in number, who represent also a certain proportion in value, to control the disposition of the estate. This may in some instances operate harshly to the minority, but if the majority can by their vote dispose of the estate at a fixed sum, the assignee's remuneration must, as it seems to me, be confined to that sum, although the purchaser and controlling creditor may thereby secure indirect advantages.

If the remuneration is insufficient the creditors may, under the Act of 1876, award additional remuneration; but I think that is the only forum empowered to increase it.

The net proceeds of the estate, in my judgment, consist of the notes given to the assignee for the 20 cents, and the amount paid to discharge the privileged claims referred to in the resolution.

Upon the best consideration I have been able to give to the matter, I think the learned Judge's order should be confirmed, and to prevent misapprehension owing to the apparent difference in the figures, I will add, that I assume the commission has been allowed and paid on all the claims referred to in the resolution, except the bank's claim, and as to that I concur in the opinion of the learned Judge of the County Court that it should be disallowed.

The appeal therefore is dismissed.

*Appeal dismissed.*

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HOLLIDAY V. THE ONTARIO FARMERS' MUTUAL INSURANCE  
COMPANY.*Libel—Privileged communication—Excess.*

The plaintiff had been the agent of the defendants, an insurance company. Having left them, he entered the service of another company, for whom he successfully canvassed among defendants' customers, asking those whose policies were about to expire to insure, not telling them that he was acting for another company. The defendants gave evidence that he asked several of their customers to *renew* their policies, without mentioning that he had ceased to be their agent. The defendants' officers were informed of all this, and that he was representing himself as their agent. Under these circumstances, defendants published in a newspaper this advertisement, "Caution. N.B.—Notwithstanding the false statements of (plaintiff) to the contrary, he is no longer an agent of this company." *Held*, reversing the judgment of the Queen's Bench, 38 U.C.R. 76, SPRAGGE, C., dissenting, that the publication was not privileged.

Per PATTERSON, J.A., that the statement was not protected by privilege, although made under the belief of its truth, if it were, in point of fact, false; and that even if the occasion precluded the implication of malice, the privilege had been exceeded both in the language used and in the publication in a newspaper, so as to afford evidence of malice.

Per BLAKE, V.C., that the language would have been privileged if made to any one dealing with the company, but that the privilege had been forfeited by its publication in a newspaper.

APPEAL from the judgment of the Queen's Bench making absolute a rule to set aside the verdict and enter a nonsuit, reported in 38 U. C. R. 76. The pleadings and facts are fully stated there and in the judgments on this appeal.

The appellant's reasons of appeal were:

1. There was no such privilege as that mentioned in the judgment appealed from, but even if there was, there was evidence to go to the jury to shew that the defendants had exceeded their privilege, and therefore the Court should not have nonsuited the plaintiff: *Fryer v. Kinnersley*, 15 C. B. N. S. 422; *Williamson v. Freer*, L. R. 9 C. P. 393; *Spill v. Maule*, L. R. 4 Ex. 235; *Holliday v. O. F. M. Ins. Co.*, (this case) reported in 33 U. C. R. 565; *Tench v. The G. W. R. Co.*, 33 U. C. R. 8.

2. No justification was proved.

3. The plaintiff is entitled to hold his verdict.

The respondents' reasons against the appeal were:

1. That the occasion under which the defendants made the statement complained of was privileged, and that they had a right to give notice that the plaintiff was not their agent: *Mulligan v. Cole et al*, L. R. 10 Q. B. 549; and no malice could therefore be presumed.

2. The occasion being privileged, the defendants were justified under the circumstances in using the language complained of: *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495; *Spill v. Maule*, L. R. 4 Ex. 232.

3. The facts in evidence shew that the defendants honestly believed the truth of what they said, and if any presumption of malice could be said to exist, it is rebutted.

4. The plaintiff's counsel did not ask that the question of excess or the question of malice in fact should be left to the jury, and if they had done so, the defendants submit no such question was sufficiently raised by the evidence: *Seaman v. Nethercliffe*, L. R. 1 C. P. Div., 540, in addition to cases cited in the judgment.

The case was argued on the 17th December, 1877 (a).

*J. Bethune*, Q.C., for the appellant. The jury have found that the publication complained of was a libel, but the defendants seek to be relieved on the ground that it was privileged. It is submitted, however, that there was no occasion for the publication, as the evidence upon which the company acted was insufficient; and even if there was the privilege which they claim, they could have accomplished all that was necessary by sending a circular to each of their policy holders, stating that Holliday was no longer their agent, instead of publishing it in a newspaper in such offensive terms. There was clearly evidence to go to the jury that the company had exceeded the privilege, if any; and the Court were wrong in nonsuiting the plaintiff. The damages cannot be considered excessive, as the company reiterated the charge in their plea of justification. He referred to the following cases in addition to those cited

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(a) *Present*.—SPRAGGE, C.; PATTERSON and MOSS, JJ.A.; BLAKE, V.C.



in the reasons of appeal: *Mulligan v. Cole*, L. R. 10 Q. B. 549; *Brown v. Croome*, 2 Stark. 422; *Tuson v. Evans*, 12 A. & E. 733; *Cooke v. Wildes*, 5 E. & B. 328; *Kelly v. Tinling*, L. R. 1 Q. B. 699; *Somerville v. Hawkins*, 10 C. B. 583; *Taylor v. Hawkins*, 16 Q. B. 308; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Folkhard's Law of Slander and Libel*, 287; *Townshend*, Slander and Libel, section 243.

*M. C. Cameron*, Q. C., and *D. McMichael*, Q. C., for the respondents. When the company published the notice they had reason to believe that the plaintiff was representing himself as their agent, and the question is not whether their information was correct, but whether they believed it to be so. If the occasion was privileged, as we contend it was, the truth or falsity of the publication cannot be left to the jury. All the authorities shew that in such a case the language used should not be scrutinized too strictly. There is no ground for the contention that the circulation was too wide. The public were interested in the information that the plaintiff was no longer the agent of the company, and unless *Laughton v. The Bishop of Sodor and Man* is bad law, we were justified in notifying them through the press. If the nonsuit is set aside, this Court, having the power to give the same relief the Court below ought to have given, should grant a new trial, as the jury gave their verdict on a ruling that there was malice. The rule is, that where a communication is privileged if made to one, and it is made to another, it must be left to the jury to say whether there was malice. The damages also are excessive. They referred to *Wright v. Woodgate*, 2 C. M. & R. 573; *Lawless v. Anglo-Egyptian Cotton Company*, 10 B. & S. 226, in addition to cases cited in the reasons against the appeal.

March 17, 1877 (a). PATTERSON, J. A.—The action is for a libel published by the defendants in a local newspaper

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(a) *Present*.—SPRAGGE, C.; PATTERSON and MOSS, JJ. A.; BLAKE, V. C.

respecting the plaintiff, who had been their general agent, in these words: "Caution. N. B.—Notwithstanding the false statements of Daniel Holliday to the contrary, he is no longer an agent of this company."

The pleas were: 1. Not guilty:

2. Justifying the allegation that the plaintiff was no longer an agent of the company:

3. Justifying the words: "Caution. N. B.—Notwithstanding the false statements of Daniel Holliday to the contrary," by the averment that after the plaintiff had left the service of the defendants, he stated to several persons, amongst whom were Malcolm Gillespie and John Martin, that he was still an agent of the defendants.

The persons named in the third plea were not called as witnesses, and there was no pretence of proof of that plea. The whole defence is under the plea of not guilty.

It was shewn that the plaintiff had been general agent for the defendants for some years, and that he resigned that office about the 1st of August, 1871. A resolution of the directors of the defendant company, passed on 1st August, 1871, accepting his resignation, was put in evidence.

In September, 1871, the plaintiff circulated hand-bills, advertising himself as agent for the Isolated Risk Insurance Company and also for the Lancashire and the Queen's.

The defendants inserted in the *Whitby Chronicle* their business advertisement, dated 6th September, 1871, at the foot of which they had a note, "Mr. D. Holliday is no longer an agent of this company." No complaint is made by the plaintiff of this advertisement.

On 5th November, 1872, the directors by a formal resolution appointed the president and secretary of the company "a committee to draft the advertisement concerning Mr. Holliday, to be published in the county papers for three separate insertions"; and, in pursuance of this resolution, the libel in question was framed and published. The usual business advertisement or prospectus of the company was published, having as a heading the word

"Caution," and appended to it the words, "N.B.—Notwithstanding the false statements of Daniel Holliday to the contrary, he is no longer an agent of this company."

The directors passed another resolution, which in the printed Appeal book is dated 3rd November, 1872, but which I think must have been passed on the 3rd of December.

The resolution is, "That the secretary be instructed to have the following advertisement inserted in the *Chronicle*: Inasmuch as D. Holliday has inserted an advertisement in the *Chronicle* and *Gazette*, challenging this company to produce proof of false statements, let it be known that this company are prepared to produce proofs of the advertisement at the proper time and place, but do not intend to enter into any newspaper controversy. N.B.—This company insures on reasonable terms," &c.

There is one other publication in evidence, and that is a letter from the plaintiff to the *Whitby Chronicle*, very emphatically denying the truth of statements made by one Thomas H. Wilson to the effect that the plaintiff practised deception by procuring people to insure in the Isolated Risk Company, when they thought they were insuring with the defendant company, of which the plaintiff had previously been agent. There is no date to this letter. John Graham, a witness, said that Wilson read the letter to him on one occasion when he told Wilson of his having, on 27th October, 1871, insured through the plaintiff in the Isolated Risk Company, when he understood, until he had signed the application, that he was insuring in the defendant company. Wilson said that he had two interviews with Graham, and that the letter was published in the interval between them, but no one tells us when the letter was written.

The president of the company was James B. Bickell, and his evidence affords the whole of the information given touching the motives which actuated the directors in the publication of the libel.

His statement was: "There was first an advertisement

that he was not our agent. We had heard generally of his abusing the company afterwards. We heard that he still persisted in his statements, and this was brought up at each meeting of the directors, and the vice president gave us individual cases of his interference with our customers. A short time after I met Mr. Martin, and he referred to his own case. Mr. Martin said that Holliday complained of another agent having interfered and got ahead of him. We published the notice in consequence of this information to protect ourselves." On cross-examination he said: "I do not remember who drew the first resolution. The information we then acted upon was that an agent, Turner, informed us, that out of thirty applications he only got two owing to the plaintiff's representations. I am not sure whether this was before the first or second advertisement. We got information of a similar purport before the first advertisement, but I cannot name any one from whom I received information. We did not send for plaintiff and ask him if it was true. I can't say why we did not do so. I can't say that I suggested that he should be communicated with. \* \* \* I still believe in the fact that he did misrepresent the company. I am not prepared to withdraw the charge. The company lost a great number of policies owing to his misrepresentations. It would have been more expensive to have sent circulars. I do not know whether it would have been more prudent. We thought our business was suffering through these misrepresentations at the time we issued the second advertisement. I think we have 4,000 or 5,000 risks now outstanding. It was solely in consequence of the interference with our policy holders that we published the advertisement. I can't say the advertisement differed from the draft."

I make this full extract for the purpose of shewing that there is not a word said expressly by the president to indicate that the directors were told or believed or acted on the idea that the plaintiff represented himself to be still the agent of the company. If that is to be



taken as the ground of their action, it must be by reason of evidence given by others than themselves. The president speaks of "misrepresenting the company," and interference with the customers of the company, and shews that the directors were keenly alive to the fact, which is otherwise proved, that the plaintiff was diverting a large part of their local business to the companies for which he was acting. One of the defendants' witnesses, John Graham, who, however, is contradicted in some of his statements by the plaintiff, states that the plaintiff told him that the defendant company was going down hill, that a good many people were saying so, and that there were too many calls and people did not like it; and John Ralph and George Robertson shewed that he was energetic in making comparisons, unfavourable to the defendants, between the premium note system of insurance and the cash system of the Isolated Risk.

There is not a word in what the president says that does not point more directly to representations of this character than to the asserted pretence that he continued agent for the defendants; and when we see what the evidence is of this pretended agency, the inference is more strongly indicated that what actuated the directors was the vigorous and successful opposition they were experiencing from the plaintiff, and his superior efficiency in the kind of contest which their witness Wilson described when he said in his evidence: "We were rival agents; I was then agent for the defendants' company; we were each puffing our wares, and when I said ours was the best company, he interfered saying, 'mine excepted.'"

I have already noted that no evidence was given under the plea of justification, or of the acts specified in that plea.

The evidence offered to shew *bona fides* in making the charge complained of relates to transactions of the plaintiff with four persons, Grace Martin, Charles Coakwell, John Graham, and Mr. Vernon.

Grace Martin's whole evidence was, "I live in East

Whitby. Mr. Holliday called once and asked if Mr. Martin was at home ; I said he was in the field. I asked him if he wanted to renew the insurance ; he said ' yes, it was about the insurance he called,' and I told him it was renewed. I think he asked by whom, but I am not certain ; he said they were ahead of him, it was too bad. I don't think he said any more ; I told Mr. Bickell that I did not know at that time that he was no longer agent. *Cross-examined.* My husband takes the *Oshawa Vindicator*. We had never noticed the advertisement. I think the words I have given are correct, I did not talk business. It was in the Fall of 1872, right after harvest, August or September. I told Mr. Bickell very soon after. *Re-examined.* When Mr. Bickell informed me that he had left the company, I said I was surprised, as we had not heard of it."

There is not a shadow of a misrepresentation in this, even without the explanation given by the plaintiff, that the insurance had been renewed by an agent of the defendants, and that the plaintiff's remarks meant that the defendants had got ahead of the Isolated Risk.

*Coakwell's* story is of the same character. Plaintiff asked him if his policy had run out. He said no ; and plaintiff finding that was so, said he would call again ; and when he called, Coakwell was aware that he was not agent of the defendants, and told him so. The evidence amounts only to this, that in a conversation which had not gone to the point at which any company had to be mentioned, no company was mentioned ; and no attempt was made to do business as agent of the company.

The evidence as to Vernon is not given by Vernon, but by George Robertson, who speaks of hearing a conversation, which he says did not interest him at all, in which the plaintiff and Vernon had an argument on the merits of the cash and premium note system, the plaintiff advocating the Isolated Risk, and urging Vernon to insure in it ; and, as Robertson says, saying also that he would insure Vernon on the premium note system if he wished—that he

was doing business for the defendant company, and would insure him in it if he wished. John Rolph, another witness to this conversation, says that Robertson's account of it is not true in the last-mentioned particular, and the plaintiff also denies it.

*John Graham's* account is, that when the plaintiff called on him on 27th October, 1871, he told the plaintiff that he had insured twice in the defendant company, and thought that this time he would insure through Willis: that the plaintiff said it was all the same, and then prepared an application which Graham signed thinking it was in the defendant company; but, when it was read over to him, he found it was in the Isolated Risk.

*Thomas W. Wilson* says he gave the directors to understand that Holliday was pretending to act for the company. He does not say that he based his information at all on his knowledge of Graham's case, or of any particular instance, but he shews that he acted on rumours which he says he heard, that the plaintiff was acting unfairly to the company.

He had, however, been told by Graham of what Graham said had occurred between the plaintiff and him, and having, as he candidly shews, no very friendly feeling towards his rival agent, he had gone to Graham to get him to repeat before a witness what he had told to himself. But, he says, "the information he gave was not sufficient, as I thought, to warrant me in bringing a suit against Holliday. He would not satisfy me definitely whether he had signed the application for insurance in the Isolated Risk before or after he was aware of his having ceased to be agent of the defendants." This investigation by Wilson supports the plaintiff's denial of having deceived Graham; and Graham himself assists to discredit his own story by shewing that afterwards, when he had the option of withdrawing from the Isolated Risk Company, he decided not to withdraw, being influenced in that company's favour by the names of some of its directors.

Now what is the result of this evidence? Is it so clear

from it that the plaintiff was representing himself to be the agent of the defendants, not for the purpose of fraudulently receiving moneys in the name of the defendants, or even taking applications in their name, for nothing of that sort is pretended, but for the purpose of fraudulently inducing persons to sign applications to some other company under the belief that they were insuring with the defendants; or even that the directors acted on the *bonâ fide* belief of that state of things, as to make it proper to withdraw those questions from the jury? As the matter appears to me, it is so far from clear that the evidence seems to preponderate in the other direction. The expression noted as that used by the president, who does not speak merely of misrepresentations by the plaintiff, leaving the vagueness of that term to be taken as indicating misrepresentations of the plaintiff's relation to the company, but defines it himself by the words "I still believe in the fact that he did misrepresent the company," points distinctly to the charge of making incorrect statements of the position of the company or unfair comparisons between it and its rivals. The "interference with our policy holders" as distinctly describes the competition which was felt to be so disastrous, and in which the discussion of the merits of the respective companies, unfair as it may have been, was a powerful weapon. The two causes combined to produce results like what Mr. Bickell says their agent, Turner, reported, viz., that out of thirty applications he only got two, owing to the plaintiff's representations.

It was to combat this interference and misrepresentation that the directors decided to publish the notice.

If the plaintiff's case depended on his proving express malice, I should find great difficulty in saying that the evidence given by the president either disproved malice or left the balance even.

There never was a suggestion that the plaintiff had acted in the name of the company under the pretence of being their agent. The charge was, that he either



announced himself as agent, or, that finding the parties under the impression that he was agent, he did not undeceive them until he had induced them to insure with another company. The evidence that he did either of these things, leaving his own denial out of the question, is not so conclusive as to be properly withdrawn from the jury. The evidence that the directors believed that he did any such thing is very shadowy, if it can be discovered at all. The established facts which the president speaks of, while they fully justify the feeling of the directors that the company required to be protected against the activity of the plaintiff, and supply a sufficient motive for action on their part, and a legitimate reason for placing the superior merits of their company before the public, as they did in every advertisement in evidence, furnish no ground for holding out the plaintiff as a person who was falsely stating that he remained agent, a charge calculated to convey a far more grave imputation than anything now suggested as chargeable against him. The plaintiff's published answer to this imputation is not in evidence, but we have the defendants' announcement of 2nd December, 1872, that at the proper time and place they will produce proofs of their advertisement. That is a reiteration of the charge, and a public promise or threat to establish by proof the allegation that he falsely stated that he continued their agent.

When the plaintiff brings his action, the defendants redeem their promise only by again repeating the charge in a plea which there is no pretence of proving, and by giving the evidence to which I have adverted.

The jury would properly find that the libel was malicious, if satisfied that the directors, in deciding to publish it, so decided with the intention of using the defamatory charge in the defence of the company against the plaintiff's competition, as the weapon which they thought would be most effective, being either careless as to whether the charge was true or false; or *a fortiori*, if they knew it to be untrue, or designedly overstated what may, in their belief, have had some foundation in fact.

In my judgment, we should be shutting our eyes to a good deal of the evidence if we were to hold that there was no evidence of malice beyond what is afforded by the use of the words "false statement." I think there is such evidence.

I shall refer on this branch of the case to some of the decisions cited to us, in which it was held either that the privilege claimed had or had not been exceeded. I shall have to notice others, when I come to consider whether any privilege can properly be claimed by these defendants.

In *Tuson v. Evans*, 12 A. & E. 733, the defendant had written to the plaintiff's agent, alleging facts in support of a claim which the plaintiff was disputing; and he added, "This attempt to defraud me of the produce of the land is as mean as it is dishonest." These words were held not to be privileged. Lord Denman said: "Any one, in the transaction of business with another, has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest in the present case to deny the truth of the plaintiff's assertion; to characterize that assertion as "an attempt to defraud," and as "mean and dishonest," was wholly unnecessary."

In *Cooke v. Wildes*, 5 E. & B. 328, the defendant, who was deputy Clerk of the Peace, had written to the Finance Committee of the Quarter Sessions a letter explaining why he had taken a contract for certain printing from the plaintiff and given it to another person. It was held that the occasion was privileged, but that the privilege did not extend to words in the letter which accused the plaintiff of "an attempt to extort a considerable sum from the county by misrepresentation"; and that those words were

evidence of malice to go to the jury, although the Judge would not have been warranted in telling the jury, that because those words were there the communication was a libel, and leaving to them only the question of damages. In this last particular the Court disapproved of the doctrine held in *Tuson v. Evans*.

In *Fryer v. Kinnnersley*, 15 C. B. N. S. 422, the libel complained of was contained in a letter written by the defendant to a Mr. Eyles respecting the plaintiff, who had been recommended by Mr. Eyles to the defendant as a gardener. Without deciding whether the communication was privileged by the occasion, it was held that no advantage could be taken of the privilege because certain expressions, such as "a raving madman," applied to the plaintiff, went far beyond the occasion.

The defendant in *Spill v. Maule*, L. R. 4 Exch. 232, had in a privileged communication described the conduct of the plaintiff as "most disgraceful and dishonest." This language was held not to be evidence of actual malice, as it was used to describe conduct which was of an equivocal nature. Cockburn, C. J., said "Now, in his own evidence, the plaintiff disclosed a fact, to which, it may be fairly presumed, the defendant referred in his letter, namely, the fact that the plaintiff had taken away bills forming part of the assets of the firm in a manner indicating an intention to retain them. This act was capable of a twofold construction; it might have taken place under such circumstances that the plaintiff could not properly be exposed to any moral censure, as, for instance, if he only intended to keep the assets in security for the benefit of creditors; or the circumstances might have been such that in taking the bills he acted dishonestly and disgracefully. Now, the presumption of law being in favour of the absence of malice in the defendant, and the only evidence of malice being his description of acts done by the plaintiff, which were capable of a twofold construction, that presumption of innocence which attaches to the writer must also, where his act is capable of a double aspect, still attend him."

The distinction is plain between that case and the present, in which the language does not assume to characterize acts admittedly done, but imputes to the plaintiff acts the commission of which is denied by him, and the proof of which is one of the debated matters in the case.

*Laughton v. The Bishop of Sodor and Man*, L. R. 4 P. C. 495, is one of the most important decisions on the subject. The defendant had been the subject of an attack in a speech made by the plaintiff as counsel in opposing a bill in the House of Keys, the representative branch of the legislature of the Isle of Man; and in addressing his Clergy in Convocation he had used the language respecting the plaintiff which was now complained of. Sir Robert Collier, delivering the judgment of the Judicial Committee, referred to *Somerville v. Hawkins*, 10 C. B. 590; *Harris v. Thompson*, 13 C. B. 333; *Taylor v. Hawkins*, 16 Q. B. 308; *Spill v. Maule*, L. R. 4 Ex. 232, quoting from the judgment in the last named case, and said "Adopting the principle of these cases, their Lordships do not think it necessary to determine whether or not the language of Mr. Laughton was (in allusion to the language of the Bishop's charge) such as is ordinarily used by barristers of high reputation, nor whether or not the accusations against the Bishop were false, or false as to the knowledge of the plaintiff or of those who instructed him, or whether they were preferred honestly or wickedly. It is enough that, having regard to the circumstances and nature of the attack upon him, the Bishop may, in their Lordships' opinion, have honestly believed that everything which he said was true, and proper for his own vindication, although, in fact, some of his expressions exceeded what was necessary for it; and that the language of his charge is more consistent with such honest belief, and with the purpose of self vindication, than with that of injuring the plaintiff."

The ground of this decision is very much the same as that in *Spill v. Maule*, and the same distinction appears between it and the present case, as between the present



case and *Spill v. Maule*. I say nothing at present as to the question of publication which arose in Laughton's case, as that touches the question of the extent to which a privilege was created by the occasion, which I am not now discussing,

There is nothing in the cases I have so far cited which, in my judgment, would warrant us in holding, that (assuming the occasion to forbid the implication of malice) the charge of falsely stating that the plaintiff was agent of the company, was not evidence of malice for the consideration of the jury. The cases I have yet to refer to do not advance the defendants' argument on this point. Wherever it has been held that defamatory words, unnecessary for the occasion that created the privilege, were not in themselves evidence of malice, except perhaps in some cases relating to the character of servants, there has been a state of facts either admitted or clearly proved, and remaining undisputed, to which the words can be referred, and in reference to which they may have been innocently uttered.

In no case has it been held that a Judge should do what is contended for here, viz., withdraw conflicting or contested evidence from the jury; find upon that evidence that certain facts were proved; and then test the animus of the defamatory words by their relation to those facts.

It is, in my opinion, impossible to hold that there was not in this case evidence of express malice.

Upon this ground there should be a new trial, provided the communication was privileged by the occasion and circumstances, and the question was, whether the privilege had been exceeded or abused. If no privilege existed, the verdict should stand.

The position taken for the defendants in claiming that the communication is protected, I understand to be, that they in good faith believed that the plaintiff, who had ceased to be their agent fifteen months before, was still holding himself out as their agent; and that, therefore, they had a right to publish to the world that he was not their

agent, and in doing so to employ the language now complained of.

The right to publish the fact that the plaintiff was no longer agent, as the defendants had done more than a year before, is not denied. No privilege was required to protect them in publishing the truth. We have, for the purpose of this branch of the case, to assume that the words are untrue as well as defamatory.

It is a somewhat startling doctrine that when one publishes of another a defamatory falsehood, he can protect himself by shewing that he believed it and thought his interest required its publication, and leave all the injury to be borne by the person who has been unjustly defamed.

To accede to the defendants' contention, we should have to carry the doctrine of privilege to a length not yet reached by any reported case. Cases may be found, such as *Blackham v. Pugh*, 2 C. B. 611, in which a communication made by one person for his own interest, to another who had no interest in the subject matter of it has been held to be protected. This accords the immunity with a liberality which may not always be easy to reconcile with the rule as interpreted by Judges of great eminence and authority. But we are asked to go much beyond that, and to extend the protection to the publishing of the defamatory statement in a newspaper, addressed to all its readers, and with such prominence and emphasis as can be given by the heading, "Caution!"; and to do this merely because the defendants believed it, and thought it for their interest that it should be published. I should more properly say, *may have* believed it, and *may have* thought, &c., for it is not found as a fact that such was their belief.

If the communication had been made to individual policy holders or applicants for insurance, I should find very great difficulty in resting the protection claimed on any intelligible ground. The information that the plaintiff was not now the agent would have been proper; and, as already observed, being true would have required no protection. The defendants would beyond question have

had a perfect right to say to Mr. A., "When you want to renew your policy, or when you want to insure with us, do not go to Mr. Holliday, he is no longer our agent"; but what principle would justify them in adding, "He has been falsely pretending to Mr. B. that he is still our agent"? Their honest though mistaken belief in the assertion might save them if there was any necessity for making it, but in the absence of this they take the risk of its being true, and should make compensation for whatever injury they do by publishing it, and not permit an innocent person to suffer by their act. When, however, the claim advanced is to the privilege of scattering the story wherever the newspapers may carry it, very clear authority should be produced in its support.

In the case of *Toogood v. Spyring*, 1 C. M. & R. 181, the doctrine of privileged communications was stated by Parke, B., in terms which have ever since been recognized and referred to as correctly embodying the rule of law. Although it has sometimes been found difficult to apply the rule, and differences of opinion have occasionally arisen as to its bearing on particular cases, it has always been adopted as the true test of the existence of the privilege. It will be useful to quote the rule as laid down, and to refer to three cases reported in 2 C. B., which are fair instances of the occasional difficulty I have mentioned.

In *Toogood v. Spyring*, 1 C. M. & R. 181, the charge was for speaking slanderous words on three occasions:—once to the plaintiff's employer; once to the plaintiff himself in the presence of a stranger; and once to the stranger when the plaintiff was not present. The first and second occasions were held privileged, the third not privileged. Parke, B., delivering the judgment of the Court, said: "We think, upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged, that is, cases where the occasion of the publication affords a defence in the absence of express malice. In

general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits. Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is, that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not well be carried on if such restraint were imposed upon this and similar communications, and if, on every occasion on which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bonâ fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another does by no means of



*necessity* take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is *sought* for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bona fide* in making the charge, or been influenced by malicious motives. \* \* We agree with the learned Judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false."

In *Coxhead v. Richards*, 2 C. B., 569, the mate of a vessel had written to the defendant, who was his friend, telling him that the captain had been intoxicated during a voyage, and asking his advice as to what he ought to do. The defendant, after consulting a couple of friends whose judgment he trusted, thought it his duty to shew the letter to the owner of the vessel. He did so, and in consequence the captain lost his situation, and brought this action.

Tindal, C. J., and Erle, J., held that the communication of the letter by the defendant to the owner was privileged.

Coltman and Creswell, JJ., held it was not privileged.

Tindal, C. J., said: "In determining this question, two points may, as I conceive, be considered as settled: first, that if the defendant had any personal interest in the subject matter to which the letter related, as if he had been a part-owner of the ship, or an underwriter on the ship, or had any property on board, the communication of such a letter to Mr. Ward would have fallen clearly within the rule relating to excusable publications; and, secondly, that if

the danger disclosed by the letter, either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the ship-owner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbour, the defendant would have been not only justified in making the disclosure, but would have been bound to make it. The question before us appears, therefore, to be narrowed to the consideration of the facts which bear upon these two particular qualifications and restrictions of the general principle."

Coltman and Cresswell, JJ., adopting the rule laid down in *Toogood v. Spyring*, 1 C.M. & R. 181, which I have already quoted, held that there was no legal or moral duty requiring the defendant to communicate the letter to the owner. Speaking of the alleged moral duty, the former said: "On the best consideration I can give the subject, I think the duty was plainly the other way. The duty of not slandering your neighbour on insufficient grounds is so clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damage when he has acted honestly, and when nothing more can be imputed to him than an error in judgment. It may be hard; but it is very hard, on the other hand, to be falsely accused. It is to be borne in mind that people are too apt rashly to think ill of others: the propensity to tale-bearing and slander is so strong amongst mankind, and, when suspicions are infused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected."

Cresswell, J., combatted the contention that there was any duty, public or private, requiring the publication, and amongst other remarks, he said: "If the property of the ship-owner on the one hand was at stake, the character of

the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the ship-owner that which he *believed* to be true."

Erle, J., referred to various cases shewing that the rule is founded on a consideration of the importance of the information to the interest of the receiver, a common application of which principle is in the giving of the characters of servants.

*Blackham v. Pugh*, 2 C. B. 611, was a case in which the interest involved in the giving of the information was that of the giver. The plaintiff, who was indebted to the defendant, had sold his stock in trade by auction. The defendant gave notice to the auctioneers not to part with the proceeds of the sale in their hands, *the plaintiff having committed an act of bankruptcy*. The action was for these words.

Parke, B., before whom the case was tried, ruled that the facts did not afford evidence to rebut the presumption of malice, and therefore directed a verdict for the plaintiff.

Tindal, C.J., and Coltman and Erle, JJ., concurred in granting a new trial, on the ground that "A communication made by a person, immediately concerned in interest, in the subject matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is held excused from responsibility in an action for libel," on the principle of *Toogood v. Spyring*.

Cresswell, J., dissented, holding that the case did not come within either of the two classes into which the cases bearing upon the point might be divided,—“One, where the communication has been made by a person having an interest in the very transaction to which it related, to another person also interested or employed in conducting it; the other, where a party having sustained a grievance, or that which he thought a grievance, has addressed a

complaint to a person whom he supposed capable of redressing it, and, in so doing, has used defamatory language."

The new trial was before Lord Denman, who directed the jury in accordance with the opinion of the majority of the Court of Common Pleas, at the same time intimating that he entertained considerable doubt as to the correctness of the direction. A bill of exceptions was tendered on behalf of the plaintiff, and errors assigned thereon, but I find no further mention of the case.

*Bennett v. Deacon*, 2 C. B. 628, raised the same question as *Coxhead v. Richards*, 2 C. B. 569. It was heard before the same bench of Judges, who were equally divided in opinion as they had been in the earlier case, though it was expressly stated by Cresswell, J., that they were all agreed as to the correctness of the rule laid down by Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 181.

*Coxhead v. Richards*, 2 C. B. 569, had been tried before Erle, J., and a verdict entered for the defendant in accordance with his opinion of the application of the rule. *Bennett v. Deacon*, was tried by Coltman, J., and the plaintiff, having the benefit of the different view taken by that learned Judge, had a verdict. The division of opinion *in banc* left both verdicts undisturbed, and the result was, that on essentially similar facts, the defaming party succeeded in the one case, and the defamed in the other.

I shall further attempt to trace the application of the doctrine in the aspects presented by the case before us, by a glance at two classes of decisions, viz., those in which the privilege has been denied, and those in which it has been accorded; confining myself, with few exceptions, to cases which were cited at the bar.

The defamatory language complained of in *Brown v. Croome*, 2 Stark N. P. 297, was contained in an advertisement published in a newspaper with the avowed object of convening a meeting of the creditors of the plaintiff, who was a bankrupt, for the purpose of consulting upon the measures proper to be adopted for their own security.



Lord Ellenborough observed, "That if the publication in question had merely suggested doubts, without alleging the facts, as in the case of *Delany v. Jones*, 4 Esp. 191, the main grievance would have been wanting. If it could be shewn that an advertisement in the Gloucester paper was the only possible means of communicating notice of the circumstances, it might be sufficient to vindicate the mode. One person could have no right to take measures for his own benefit to the injury of another. The argument which had been used was ingenious, but the defendant made no progress in his defence, unless he could shew that such a publication was the only effectual mode of convening the creditors. A communication sufficient for the purpose might have been made in measured language. The want of proper caution had rendered the publication actionable, as being published to the world at large. This made an essential distinction which applied to all the cases. In the instance of a brief to counsel, for instance, the publication as between the attorney and the counsel might not be libellous, and yet if it were to be printed and published there might be a libel in every line. Every *unauthorized* publication to the detriment of another was, in point of law, to be considered as malicious."

The defendant in *Parsons v. Surgey*, 4 F. & F. 247, had called a meeting of the shareholders of a railway company, to which he summoned reporters and the public, and at that meeting had spoken of the plaintiff, who was chairman of the company, the words complained of.

Cockburn, C. J., in charging the jury, said: "The defendant set up two defences,—that whatever he said was true; but, if he was unable to establish the truth, then he set up that he was excused, because he acted *bonâ fide*, and with a knowlege and belief that it was true, and with an honest intention to promote the interests of the shareholders, and not with a desire to injure or pain Mr. Parsons. The matter was certainly one of great interest and importance to the shareholders, and the discussion or publication of the results to them would have been excused.

It could not, however, be a privileged communication, because others besides the shareholders were invited to attend the meeting, and it was particularly stated that the representatives of the public press would be there."

*Kelly v. Tinling*, L. R. 1 Q. B. 699, is merely an instance in which, the occasion being held to justify the publication as a matter of public interest, the opinion of the jury was taken as to whether the language used was stronger than the occasion justified.

In *Tench v. Great Western R. W. Co.*, 32 U. C. R. 452, a printed statement of the grounds on which the plaintiff had been dismissed from the employment of the defendants was held to be privileged so far as it was communicated to the other servants of the company, or exposed in places to which only persons connected with the service of the Company were authorized to have access. It is stated, however, to have been put up in some of the offices and stations of the Company, where anybody could see it. This was held by the Court of the Queen's Bench not to be justified.

Wilson, J., delivering the judgment of the Court, said: "The Company could print the matter contained in the hand bills, and distribute the bills among their employes; and if the employes chose to put up or to distribute the bills to others, the Company would not have been liable. But here the Company, by their own immediate authorized officers, put up the bills in the places which were spoken of as being public, and so that anybody could see them, and *that* they were not justified in doing. That is conduct which displaces the privilege, and re-establishes the charge of malice."

When the case was before the Court of Appeal, the facts were somewhat differently understood. In place of the placard being exhibited in a public station, it was understood to have been confined to the private offices, though placed where inquisitive persons buying tickets at the wicket could see and read it. A majority of the Court held that the privilege had not by this kind of publication

been exceeded; but I do not gather that any of the learned Judges doubted the correctness of the application of the law in the Court below to the facts as there dealt with.

*Williamson v. Freer*, L. R. 9 C. P. 393, decided that a communication that would have been privileged if sent in a sealed letter, lost that protection when transmitted by telegraph, as although the telegraph clerks are prohibited under severe penalties from disclosing the contents of telegrams passing through their hands, still there was a disclosure to them. It was communicated through unprivileged persons.

I now turn to the class of cases in which the claim of privilege was successful.

In *Wright v. Woodgate*, 2 C. M. & R. 573, a letter was held to be privileged, which was written by the defendant, who was solicitor for the plaintiff, to one Byrom, who was the plaintiff's next friend in pending litigation. The object of the letter was to induce Byrom not to consent to an anticipated application on the plaintiff's part to change his solicitor, until the defendant's costs had been paid.

Lord Abinger, who had tried the case, said: "Undoubtedly I was induced by the remarks which fell from Mr. Erle to alter my opinion as to the effect of the letter, and to consider it privileged, not only as relating to the interest of the defendant, but also as relating to that of Byrom, in order that he might know something of the character and conduct of the young man who was about to make such application to him. I still adhere to that opinion."

At the trial, in *Somerville v. Hawkins*, 10 C. B. 583, it appeared that the plaintiff had been in the service of the defendant, and had been dismissed on a charge of theft; that he afterwards came to the defendant's house, and had some communication with the defendant's servants; and that the words in question,—“I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him,”—were spoken by the defendant to his servants.

Maule, J., delivering the judgment of the Court, said:

“ We think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bonâ fide*, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge,—a supposition always to be made when the question is whether a communication be privileged or not,—it was the duty of the defendant, and also his interest, to prevent his servants associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself. We think, therefore, the communication was privileged, *i. e.*, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. \* \* It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to a jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.”

This case seems to carry the doctrine to a great length, both in stating the rule itself and in defining province of the Judge as apart from the jury. Some of the *dicta* taken literally as reported, would rest the privilege on the interest of the person using the defamatory language, without reference to the interest or duty of the party addressed, or his relation to the subject matter. But reading it altogether, we find the decision rested on the fact that the servants, as well as the master, were interested, and so it affords no countenance to the contention that the immunity would extend to defamatory language communicated to a stranger to the matter, either by personal information or public



announcement, and does not conflict with *Tench v. Great Western R. W. Co.*, or any case decided on the principle stated by Wilson, J., in the passage I have quoted from his judgment in that case.

The only question in *Taylor v. Hawkins*, 16 Q. B. 308, which concerns us at present, was, whether the master was justified in calling in a witness when he was dismissing his servant for alleged dishonesty. The rule stated in *Toogood v. Spyring* that the mere presence of a third person does not take away the privilege from the communication, but that it may be a circumstance from which the jury may judge whether or not the charge was made *bonâ fide*, was said by Patteson, J., only to apply when the third person is a mere stranger; and it was held that what had been done was only what a just and prudent man would have been most desirous of doing, and raised no presumption of malice.

The ground of the decision in *Harrison v. Bush*, 5 E. & B. 344, is stated by Lord Campbell in these words: "During the argument a legal canon was propounded for our guidance by the plaintiff's counsel; and this we are willing to adopt, as we think that it is supported by the principles and authorities upon which the doctrine of privileged communications rests: 'A communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminary matter which, without this privilege, would be slanderous and actionable.'"

The rule as thus stated is by no means so broad as some of the language reported to have been used by Maule, J., in *Somerville v. Hawkins* would imply; but it exactly fits the grounds on which that case was decided.

The plaintiff in *Kœnig v. Ritchie*, 3 F. & F. 413, had held a policy in the Scottish Equitable Life Ins. Co., which had been declared to be void by Vice-Chancellor Stuart in the case of *Fowler v. The Scottish Equitable Life Ins. Society*, 4 Jur. N. S. 1169. The plaintiff had thereupon published

a pamphlet, in which he accused the directors of fraud. They published a pamphlet in answer, declaring the charges to be false and calumnious, and asserting that the plaintiff had sworn in opposition to his own handwriting. This was the libel complained of, and the publication charged against the defendant, who was the manager of the company's London office, was the delivery of a copy to one Jones, who, having gone to the London office and proposed for a policy, asked the defendant if the society ever disputed their policies, to which the defendant answered that they had never done so except in one case, which he said he would find described in the pamphlet which he handed to him. Jones in his evidence said that the defendant added that it was a "gigantic fraud." The defendant denied this. There was a count charging these words as a substantive slander.

Cockburn, C. J., held that the answer was privileged, and that the publication was privileged, and he directed the jury to find for the defendant on the general issue, if they were of opinion that it was *bonâ fide* for the purpose of the defence of the company, and in order to prevent the plaintiff's charges from operating to their prejudice, and with a view to vindicate the character of the directors, and not with a view to injure or lower the character of the plaintiff, and if they thought that the publication did not go beyond the occasion. The case affords no intimation of how far the privilege would have extended if the defendant had put the pamphlet into general circulation.

*Whiteley v. Adams*, 15 C. B. N. S. 392, was decided upon the rule laid down in *Toogood v. Spyring*, and more recently in *Harrison v. Bush*, 5 E. & B. 344, and which I have already quoted from both of those cases. The charges related to two letters,—one written to a Mr. Cleaver, the other to a Mrs. Hurry,—both of those persons being distinctly interested in the subject matter. The question was as to the interest or duty of the defendant requiring the communication; and the facts on which the solution of that question turned afford no instruction in the case before us.

*Lawless v. Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262, was decided by the same application of the rule as was made in *Tench v. Great Western R. W. Co.*, in the Court of Queen's Bench, so far as the hand-bills in that case were held to come within its protection. The directors of the Company had included in their report to the stockholders a report made to them by the auditors of the Company, which contained the aspersions of which the plaintiff complained. It was held by Mellor and Hannen, JJ., overruling the opinion held at Nisi Prius by Kelly, C. B., that it was the duty of the directors to communicate the auditors' report to the stockholders; and that, as it was for the interest of all the shareholders to be informed of the report, the printing of the report and the circulation of it among the shareholders was privileged.

*Henwood v. Harrison*, L. R. 7 C. P. 606, was an action against the Queen's Printer for circulating a minute prepared by the First Lord of the Admiralty explanatory of the course he had pursued in the reconstruction of the navy, for the purpose of its being presented to Parliament. It made reference to and criticised a plan proposed by the plaintiff for converting wooden ships of war into iron-clads, and in a note was inserted a letter addressed to the Board by the Controller of the Navy, which contained the alleged libel. The communication was held by Willes, Byles, and Brett, JJ., Grove, J., dissenting, to be privileged, on the ground that it was a fair criticism upon a matter of public and national importance.

Willes, J., in delivering the judgment of himself and Byles and Brett, JJ., after quoting the rule laid down in the Exchequer in *Toogood v. Spyring*, 1 C. M. & R. 181, and in the Queen's Bench in *Harrison v. Bush*, 5 E. & B. 344, and acted on in the Common Pleas in nearly the same terms in *Whiteley v. Adams*, 15 C. B. N. S. 392, made the following observations, which are very pertinent to our present purpose: "It is clear that the privilege so established in respect of duty or interest, however necessary and valuable, must be exercised within the limits

which the interest or duty indicates ; and that, in many of the instances of privilege to which reference has been made, a public statement to an individual not having any interest in the matter might be held libellous. The statement must be such as the occasion warrants, and made to a person who is interested in receiving it. The mere fact of the presence of a person uninterested has been held to be insufficient to take away the privilege, as in many of the cases as to master and servant ; but the statement to a person wholly uninterested would in such a case be defamatory—as, for instance, in the case of a joint stock company, the publication of a defamatory report of the auditors of the company to the shareholders, whom alone it interested, might be privileged, whilst its general circulation might be libellous : *Lawless v. Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262. In others of the cases referred to, the publication has been held to be privileged, though made in the form of a hand-bill, or a statement in a newspaper, where the subject was one in which the public had an interest ; and this was remarkably the case in *Wason v. Walter*, L. R. 4 Q. B. 73, where the subject received the most elaborate and satisfactory consideration.”

The communication in *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495, was made by the Bishop first addressing his charge to his clergy in convocation, and then publishing it in a local newspaper. Sir Robert Collier in delivering judgment refers to the well known principle, which he quotes from *Whiteley v. Adams*, 15 C. B. N. S. 392, and explains its application in these words : “The Bishop had manifestly an interest in explaining and defending his conduct, if indeed it were not strictly his duty to do so ; and the clergy were deeply interested in that explanation and defence. It does not necessarily follow that the publication of the charge by the Bishop in the local newspaper was equally privileged. Considering, however, that the laity as well as the clergy are deeply interested in the character of their Bishop in his conduct of the affairs of his diocese, and that



the speech impugning his character and conduct had been addressed to both clergy and laity, and conveyed to both by the press, their Lordships are of opinion, that the Bishop was privileged in addressing his defence to both through the same channel which had conveyed the attack, provided he did this *bonâ fide* for the purpose of vindicating himself, or informing the public upon matters which they were concerned to know, and not of defaming or injuring the appellant."

This justification of resorting to the press as against a plaintiff who had initiated that system of attack, is put upon a ground touched upon by Cockburn, C. J., in the case of *Kœnig v. Ritchie*, 3 F. & F. 413, which I have already cited, and alluded to by Erle, C. J., in his charge to the jury in *Hibbs v. Wilkinson*, 1 F. & F. 608, in these terms: "Where the plaintiff and defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff *first* had recourse to the press, and made the matter public, it is, in such a case, important to see if malice is made out against the party sued, or if he has published only what he believed to be required for the interests of truth."

*Mulligan v. Cole*, L. R. 10 Q. B. 549, appears to support pretty directly the principle on which it seems to me so clear that the defendants before us fail in making good their claim to privilege. The declaration charged the publication in a newspaper of the words following: "Walsall Science and Art Institute. The public are respectfully informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." Innuendo that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions on behalf of the institute. Now if this innuendo had formed in words a substantive part of the libel, the case would have been on all fours with the present one, and it would have been pretty much the same if the innuendo had been established. There is no reason to doubt

that in either of those events the plaintiff would have succeeded. He failed, however, not on any ground of privilege, but because the innuendo was not proved, and because it was held that the words were not capable of conveying the meaning charged or any defamatory meaning.

The most recent English case which I have seen, viz.: *Purcell v. Souler*, L. R. 1 C. P. Div. 781, and since affirmed on appeal, is in accord with the views I have expressed.

My view of the evidence, which I explained in the earlier part of my judgment, differs materially from that expressed by Mr. Justice Wilson in his judgment in the Court below, and this fully accounts for the difference of our conclusions on the branch of the case which I first discussed.

On the other branch we differ, not in our apprehension of the rule of law, but with regard to its application to the facts in evidence. A remark made by Byles, J., in *Whiteley v. Adams*, 15 C. B. N. S. 419, is appropriate here. Speaking of the rule as enunciated by Parke, B., in *Toogood v. Spyring*, he said: "The more that case is examined, the more carefully and accurately the rule will be found to be expressed. Its application to particular cases has always been attended with the greatest difficulty, the combination of circumstances are so infinitely various."

The circulation of a defamatory statement in a newspaper, like its publication in any other form, must depend for its justification on the ground of privilege upon the application of that part of the rule which requires an interest in the subject matter, or a duty with respect to it, in the person to whom the communication is made. Even when the person complaining of an attack through the press has himself been the aggressor in that mode of warfare, that circumstance, while it may place him beyond the range of sympathy, only affords a tangible defence on the ground that by his appeal to the public he has given the public an interest in the subject matter. This principle is recognized in the judgment now in review; and the interest

of the public, to whom the defendants addressed their advertisement, is placed upon grounds which appear in the following passages which I extract from the judgment delivered. It is said: "The occasion was privileged: the defendants published the article in defence of their rights and interest, and in the discharge of a duty which they owed to their policy holders, *and to all others who would be likely to deal with them.*" And again, "If the article complained of would not have been too strongly worded if it had been published only to the customers of the Company, has it lost its privilege by being published in a newspaper in the County? I think it has not. A circular to each of the 5000 policy holders of the Company would probably have made it more notorious than its insertion in a local paper having a circulation of 700 or 800. But a circular to the policy holders of the Company would not alone have answered, because the defendants were themselves looking for additional customers by their different agents, and they had to communicate with those who were not customers as well as with those who were, and they could not do that in any way less public than through the newspapers. Their customers were dispersed all over the county. Their field of operation was all over the county. And they had to counteract and correct the mischief and injury which they believed were being daily done to them by the plaintiff, their former agent; and they had to do so promptly and effectually."

In my judgment the public were utter strangers to the subject-matter, and I find no warrant for holding that they are less so, merely because some of them *may*, and because the defendants hope that all of them *will* seek for insurance in their company, even leaving out of view the extravagance of the assumption that every reader of the newspaper has or will have insurable property.

Neither do I find authority for holding that publication to a small number of persons, some of whom have no interest in the matter, can be excused on the ground that

communication to a larger number who have an interest, and to whom it may be a duty to give the information, would disseminate the slander more widely.

The comparative extent of the injury is not the question. A man may have to submit, without complaint, to the wide circulation of an injurious report, if it is within the protected limits; but yet is entitled to redress for injury caused by the unauthorized disclosure to but one or two persons.

I am clearly of opinion that, in both branches of the case the defendants have failed to sustain their contention, and that the publication not having been protected by privilege, the plaintiff is entitled to the *postea*, and the appeal should be allowed, with costs.

SPRAGGE, C.—I have had the advantage of reading the learned and elaborate judgment of Mr. Justice Patterson. His review of the authorities and his copious extracts from them make it unnecessary for me to refer to them. I have also read the judgment of the Court below, delivered by Mr. Justice Wilson, which I may characterize in the same terms.

The position of the defendants as an insurance company and the occupation of the plaintiff as an insurance agent, and their relative position previously to the publication complained of, and the change in their relations, that of the plaintiff to be an active canvasser of what may be designated, so far as its agency was in the hands of the plaintiff, as a rival company, furnish the *occasion* upon which the defendants justify their publication. It was their undoubted right to protect their interests by informing those who had insured with them, and I should say also those who might insure with them, that the plaintiff had ceased to be their agent, he at the time canvassing for other companies. It was an occasion falling within Lord Wensleydale's definition in *Toogood v. Spyring*: "In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice."



The question then arises, was there actual malice in this case. My conclusion from the evidence is, that actual malice is not shewn, but that the defendants believed, I assume mistakenly, that the plaintiff was leading persons with whom he came in contact as an insurance agent to believe that he was agent for the defendants' company, or leaving those who thought so under that belief: that by *suppressio veri*, if not by *suggestio falsi*, he led them into or left them in that belief. The defendants no doubt felt sore at the successful canvass of the plaintiff in the interest of his new employers, and felt aggrieved at the comparisons drawn between them and the defendants, to the disparagement of the latter; and at the loss to themselves occasioned thereby; but I do not think that it is a just inference from such being their feeling that they were actuated by malice in publishing what they did.

I agree that the words imputing falsehood to the plaintiff were beyond what was strictly necessary for the plaintiff's protection; but we find that in many of the cases the language used went far beyond what was necessary or proper—in some of them it was vituperative; but they were still held privileged. This was the case in several of the cases cited by Mr. Justice Patterson. Whether, when that which but for privilege would be a libel is published in a newspaper, a stricter rule is applied, is another question. There may of course be excess in language and excess of publication, but the excess in the former must be so great as to be evidence of malice, or the privilege is not lost. If there be some excess in language, but not such as to be evidence of malice, and if there be not excess in publication it seems to me to follow that the privilege is not lost. That indeed was the case in *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495. Then as to the publication in the newspaper and its necessity or propriety, I cannot agree with my brother Patterson that the public were utter strangers to the subject matter. My learned brother's own words best express his view upon this point: "I find no warrant for holding that they (the public) are less so merely because

some of them may, and because the defendants hope that all of them will seek for insurance in their company, even leaving out of view the extravagance of the assumption that every reader of the newspaper has or will have insurable property." I think the defendants put what they had to say in a local newspaper for a very intelligible reason—their interests were not only with those who were already insured with them, but they hoped to find customers (so to call them) among those who were not already insured with them; who those might be it was simply impossible to tell, and they used a local paper as a voice the most likely to reach those with whom it was their desire as it was their interest to communicate. I agree with what was said in the Court below upon this point. I do not think, assuming that the defendants were privileged to make this communication at all, that they did it in a shape (I speak of the publication) that is liable to just exception.

Whether the judgment of the Court below should have been for a new trial, or, as it was, for a nonsuit, is another question. I should have preferred that it had been for a new trial; but I cannot say that it is wrong as it is.

BLAKE, V. C.—The defendants and their agents were justified in making use of the expression complained of to any person dealing with the company. Such communication being privileged, the Court will not subject to strict scrutiny the language in which it is clothed. But where the company determined to make a statement as to the plaintiff to the general public in the locality in which he lived, including those who had no interest in the company or its concerns, thus going beyond that which the occasion called for, the privilege ceased, and the consequence of such statement must fall on the person making it as in the ordinary case of one man defaming another. The company could have told the public the plaintiff was not their agent without adding "notwithstanding the false statements of Daniel Holliday." Having spread this statement beyond

those so interested in the information as to make it a privileged communication, the protection allowed to such a matter is withdrawn, and the person making it is responsible as in the ordinary case of one person libelling another. I think the damages awarded are \$950 more than they should be, but as this is the second verdict that has been rendered for the plaintiff, giving him substantial damages, I do not see that there would be much use in seeking to moderate the verdict by a new trial. The verdict must be permitted to stand, and the appeal allowed with costs.

MOSS, J. A., concurred with PATTERSON, J. A., and BLAKE, V.C.

*Appeal allowed.*

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## ST. MICHAEL'S COLLEGE V. MERRICK ET AL.

*Equitable attachment of debt—Garnishment—Pleading—Equitable defence at law—A. J. Act, 1873, s. 3—Construction of.*

The plaintiffs had obtained a verdict at law against J. D. M., and a rule *nisi* to set aside the verdict was pending, when the bill in this suit was filed on behalf of all the creditors of J. D. M. to impeach a transaction whereby, S. M. the wife of J. D. M., was substituted for him in a contract in which he was interested with one A. M. It alleged that J. D. M. was insolvent, and that he had induced A. M. to admit S. M. as a partner in his stead for the purpose of defrauding the plaintiffs in the recovery of their debt: that A. M. afterwards purchased J. D. M.'s interest, and agreed to pay S. M. \$10,000 therefor, (which sum was not due at the commencement of this suit): that S. M. was merely a trustee for her husband in respect of this agreement; and the bill prayed for an injunction to restrain A. M. from paying the \$10,000 to either of the defendants, and that the money might be applied to the payment of their debt.

A demurrer for want of equity was allowed by PROUDFOOT, V. C., on the ground that the A. J. Act, 1873, required the plaintiffs to pursue the remedy sought by the bill in the Court in which the action was pending. On appeal, the judgment below was affirmed, on the ground that the bill was not sustainable, as the moneys could not be attached in equity, but *Held*, also, that the A. J. Act had no application: that sec. 3 of that Act is permissive; and that a defendant may either plead his equitable defence at law, or take proceedings in equity, but the equitable defence must be raised before judgment, for a judgment at law once recovered against him will be unimpeachable in equity.

Per Moss, J.A.—Even if the Act were compulsory it would not apply, for a party would be bound only to plead what might be necessary to meet his opponent's case; and as to collateral matters not in question in the action, the jurisdiction of the Court of Chancery would remain as before. By an amendment it was stated that subsequently to the filing of the bill the Federal Bank gave notice that they claimed a lien on A. M.'s *bond* to S. M. to assure payment of the purchase money, as assignee of S. M., but there was no distinct allegation that a bond was given.

Per PATTERSON and Moss, JJ.A.—The defendants could not be required to answer a statement so uncertain and inconclusive.

THIS was an appeal from an order of Proudfoot, V. C., allowing a demurrer to the bill filed by the plaintiffs on behalf of themselves and all the other creditors of Merrick.

The material allegations of the bill were that the defendant, Jeremiah D. Merrick, became indebted to the plaintiffs in the sum of \$520 for the board and education of his children: that the plaintiffs, having sued him at law, recovered a verdict in March, 1876; but that a rule *nisi* to set aside the verdict having been obtained, and still



remaining undisposed of, judgment had not been entered : that in February, 1874, Merrick and the defendant Manning became joint contractors with the Government of the Dominion for the construction of a portion of the Welland Canal: that Merrick, being at the time of obtaining the contract in insolvent circumstances, and intending to defraud the plaintiffs, induced Manning to admit his wife, the defendant Sarah Merrick, into partnership with him for the construction of the said work in the place of Merrick himself ; but that, notwithstanding this arrangement, which was only nominal, Merrick continued to be the real partner, and any rights or privileges to which his wife succeeded by virtue of such pretended substitution, were held by her in trust for Merrick : that Manning never spoke to Mrs. Merrick on the subject of their partnership, and that the substitution of the name of Mrs. Merrick was merely a covinous contrivance to cloak the scheme for defrauding the plaintiffs of their debt : that Mrs. Merrick gave no consideration, and knew of her husband's insolvency, and of the object with which her name was substituted : that Merrick, fearing that his interest in the partnership could not remain concealed, endeavoured to sell it, and finally prevailed on Manning to become the purchaser thereof for the price of \$10,000, payable in November, 1876 : that although the sale was conducted by Merrick nominally on behalf of his wife, he was really acting on his own behalf, and that he was to receive payment of the said sum for his own use and benefit : that Mrs. Merrick was a trustee for her husband in respect of this sum : that the plaintiffs were apprehensive that unless an injunction was awarded payment would be made, and the plaintiffs would be defrauded ; and that by reason of the circumstances set forth, the plaintiffs were without remedy at law.

Then by an amendment it was alleged that subsequently to the filing of the bill the Federal Bank gave notice that they claimed an interest in or a lien on the bond of the defendant Manning to Sarah Merrick to assure payment of

said purchase money, as assignees of Sarah Merrick. There was, however, no allegation that a bond was given.

The prayer was for, an injunction to restrain Manning from making payment to the other defendants, J. D. Merrick, Sarah Merrick, or the Federal Bank, in respect of the partnership transactions or of the bond; for a declaration that the interest in the said partnership was taken in the name of Mrs. Merrick with the view of defrauding her husband's creditors, and that it was subject to the claim of the plaintiffs and the other creditors of Merrick; for an account of the amount due to the plaintiffs by virtue of their verdict, and for an order for payment by Manning, and for relief by way of equitable execution.

The defendants Merrick and his wife demurred for want of equity. The demurrer was allowed by the learned Vice Chancellor, on the ground that the Administration of Justice Act required the plaintiffs to pursue their remedy in the action at law which was pending, and to have asked there for the relief sought by this bill.

The appellants' reasons of appeal were:—

1. The bill being a good bill on the merits, the defendants' demurrer does not lie, and it ought to have been overruled.

2. The Administration of Justice Act does not compel parties to work out all their remedies in the Court in which a suit was first begun, but is only permissive for the purpose.

3. But even then it only applies to the same parties who were parties to the suit first begun, or probably includes formal parties, or the like.

4. It cannot apply to suits for different purposes, and where distinct and independent relief is sought, and where there are new parties.

6. There is no suit at law between the parties hereto, as appears by the bill; and the Administration of Justice Act does not and cannot apply in any manner.

6. If any one should apply (which is denied) in the common law suit, it must be the defendants who object to the filing of this bill.

7. The several cases decided in the Court of Chancery as *Sawyer v. Linton*, 23 Gr. 43; *Knox v. Travers*, 23 Gr. 41, &c. have no application to this case.

8. The scope and intent of the Administration of Justice Act has been misconceived; and to work out the reasoning applied in this case by the learned Vice-Chancellor would lead to interminable difficulties, and in very many cases make litigation endless and practical results impossible.

9. On various other grounds the demurrer is wholly unsustainable.

The following were the respondents' reasons against the appeal:—

1. The plaintiffs' bill makes no case, or no case entitling the plaintiffs to relief against the said defendants, Jeremiah Dease Merrick and Sarah Merrick.

2. The plaintiffs admit by their bill that they commenced their action in the Court of Queen's Bench after the Administration of Justice Act of 1873 came into force, and that it was still pending there at the time the bill was filed herein; hence since the Administration of Justice Act of Ontario the plaintiffs could not come to this Court for relief while the said action was pending in said Court, without the leave of said Court.

3. The plaintiffs did not first try to obtain the relief which they seek to obtain in this Court from the Court where they first brought their action, nor did they apply to the Court where they first brought their action for leave to file a bill in this Court.

4. Whether the Court in which the action is originally brought does or does not possess the requisite powers and machinery for giving to the parties complete relief, or the measure of relief they seek, is a question for that Court to determine, and is not left to the will of the parties.

5. Suits in Chancery and actions at law can only be transferred from Chancery to the Courts of law, and the reverse, by the leave of the Court or Judge. (Sections 3, 8, 18 and 20 A. J. Act of 1873.) When a suit or proceeding has been transferred by rule or order, proceedings

must be continued to the end in the Court in which the proceedings have been transferred, indicating the policy of the Act to be, that a change from Court to Court is not in the option of the parties. (Section 20.) A party must work out his complete remedies in the Court in which he begins his suit or action, subject to certain exceptions; and the plaintiffs' case is not within those. (Section 8, A. J. Act, 1873.)

This view of the Act is confirmed by several decisions, among others: *Falls v. Powell*, 20 Gr. 462, 467; *Kennedy v. Bown*, 21 Gr. 95; *Kerr on Injunctions*, page 62; 36 Vic. ch. 8, secs. 2, 3, 8, 9, 11, and 12, Administration of Justice Act of 1873; *McCabe v. Wragg*, 21 Gr. 97; *Imperial Loan and Investment Co. v. Boulton*, 22 Gr. pp. 121 and 122; *Fenn v. Crosbie*, 22 Gr. 122; *McKinnon v. Boulton*, 22 Gr. 122; *Casey v. Hanlon*, 22 Gr. 445; *Sawyer v. Linton*, 23 Gr. 43; *Henderson v. Watson*, 23 Gr. 355; *The Victoria Mutual Fire Ins. Co. v. Bethune*, 23 Gr. 568; *Knox v. Travers*, 23 Gr. 41; *French v. Taylor*, 23 Gr. 436; *Standly v. Perry*, 23 Gr. 507, 523.

6. The plaintiffs' bill is in the nature of a garnishee bill, and the Court of Chancery has no power to garnishee the amount payable by the defendant Manning to the defendant Sarah Merrick under the circumstances stated in the bill, in satisfaction of an unproved claim of the plaintiffs against the defendant Jeremiah Dease Merrick: *Gilbert v. Jarvis*, 16 Gr. 265; *Blake v. Jarvis*, 16 Gr. 295; *Horsley v. Cox*, L. R. 4 Ch. App. 92.

7. The alleged procurement by the defendant Jeremiah Dease Merrick of the substitution of the defendant, Sarah Merrick, in place of himself as partner with the defendant Manning, as grantees of the contract mentioned in the said bill, is not a fraudulent, illegal, or wrongful conveyance within the meaning and control of the statute 13 Elizabeth, or of any other statute relating to illegal, wrongful, or fraudulent conveyances in force in this Province.

8. There can be no conveyance, either fraudulent or otherwise, of an unexecuted contract, or unearned profits, or



unascertained loss ; and if there can be such a conveyance, the statutes relating to fraudulent conveyances do not apply : *Longeway v. Mitchell*, 17 Gr. 190.

The case was argued on March 16, 1877 (*a*).

The *Attorney-General*, (*E. Meek* with him) for the respondents, who were called upon to begin. The bill does not contain any ground for relief in equity. It is not shewn that any property was put out of the reach of creditors, which they were entitled to. The original interest in the contract was not one that the creditors could have availed themselves of ; and the Court will not set aside the transaction whereby that interest was vested in the wife. Then, it is alleged that Merrick's wife is a trustee of a debt due from Manning to him on account of the partnership, but, such a debt cannot be garnished in equity by a creditor. There is no allegation in the bill that a bond was given, and, independently of it there was nothing to seize, as the agreement to pay Sarah Merrick the \$10,000 was merely an equitable debt to the husband, and could not be made available for creditors. There is no pretence that this bill could be maintained until the garnishment of debts was allowed, and all the authorities shew that the creditor must have obtained an attaching order before coming into equity, which has not been done here. At all events the demurrer was properly allowed, as the A. J. Act, 1873, gives the Court in which the suit was commenced full power to do complete and final justice between the parties ; and the plaintiffs should have obtained the relief they now seek in that Court. The following cases were referred to, in addition to those cited in the reasons against the appeal : *Turnley v. Hooper*, 2 Jur. N. S. 1081 ; *Horsley v. Cox*, L. R. 4 Ch. App. 92 ; *Coleman v. Croker*, 1 Ves. 161 ; *Gilbert v. Jarvis*, 16 Gr. 268 ; *Blake v. Jarvis*, 16 Gr. 295 ; *Duffy v. Graham*, 15 Gr. 547 ; *Smith v. Hurst*, 10 Ha. 30 ; *Collins v. Burton*, 4 DeG. & J.

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(*a*) *Present*.—HAGARTY, C.J.C.P. ; BURTON, PATTERSON, and MOSS, JJ.A.

612; *McMaster v. Clare*, 7 Gr. 560; *Demorest v. Helme*, 22 Gr. 433; *French v. French*, 6 DeG. M. & G. 95; *Freeman v. Pope*, L. R. 9 Eq. 206; S. C. 5 Ch. App. 538.

*Fitzgerald*, Q. C., (with him *J. A. Donovan*) for the appellants. The A. J. Act 1873 has no application to this case, as it is between different parties and relates to a different subject matter. The subject matter in the action at law was a debt due by Merrick to the plaintiffs, while this bill was filed on behalf of the creditors of Merrick generally against Merrick and others to impeach a fraudulent transaction. But even if the Court of law has jurisdiction in such a case, it is only co-ordinate with the Court of Chancery. The statute is clearly permissive, and does not preclude a party from resorting to a Court of equity. He may still file a bill and bring an action at law—but the Court may stay one. The Legislature used similar language in the Common Law Procedure Act with reference to pleading an equitable defence at law, and it has been interpreted by a long line of decisions to be permissive. This is not a bill for equitable garnishment, and therefore *Gilbert v. Jarvis* does not apply.

June 27, 1877 (a). HAGARTY, C. J. C. P.—I fully concur in the view expressed as to the Administration of Justice Act in the judgments that are to follow.

On the other branch of the case the bill in substance is: We are suing Merrick for a debt, but have not yet recovered judgment. By a fraudulent arrangement he has had his wife's name substituted for his own with his co-contractor Manning. To prevent our recovering our debt he has persuaded Manning to purchase his interest (nominally his wife's) for \$10,000, payable next November. He will receive the money. He is insolvent, and we shall not be able to enforce our judgment. We therefore ask the Court to interfere, &c.

It seems in substance the same as if the wife's name be

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dropped altogether, and that Manning is at a future day to pay the defendant in the action a large sum of money, and the Court is asked to intervene, and intercept or delay that payment, and have it made available to pay the expected judgment.

I do not see how the Court could entertain such a claim.

It is in effect to garnish the debt expected to be paid by a third person to the defendant at law, in favour of parties who are not, but expect to become, judgment creditors.

A jurisdiction of this nature has been given to the Division Courts by the Ontario Act, 32 Vic. ch. 23, sec. 7, *et seq.* I do not know how it has been found to work. It does not, however, extend to the Superior Courts of law or equity.

The claim against or to be paid by Manning, is treated throughout as really due to Merrick, though nominally or colourably to his wife. I think there is no jurisdiction to interfere.

I do not think it necessary to discuss the view of the law adopted by Strong, V. C., in *Longeway v. Mitchell*, 17 Gr. 190. There the apprehended mischief was, that the fraudulent alienee might convey to an innocent purchaser for value, and so all remedy be lost. Here it is merely that the moneys coming from Manning will get into the hands of the debtor Merrick.

BURTON, J. A.—There being no report of the judgment of the learned Vice Chancellor, we have not the advantage of seeing upon what precise grounds he allowed the demurrer, but it was stated upon the argument, and in the reasons for and against the appeal, that the learned Judge gave effect to the defendants' contention, that as it appears by the plaintiffs' bill that they commenced an action in the Court of Queen's Bench after the Administration of Justice Act of 1873 came into force, which was still pending there, they were bound to endeavour to obtain the relief which they sought in this suit from the Court of Queen's Bench, and that they could not, without an order of that Court, take these proceedings.

The action at common law was for the recovery of a debt alleged to be due by one of the defendants, Jeremiah Dease Merrick, to the plaintiffs, in which a verdict was obtained in favour of the plaintiffs, but against which a rule was obtained in the following term, and the proceedings upon that rule were still pending at the time this bill was filed.

The object of that Act, or one of the objects, was, to prevent the necessity for two suits with reference to the same *subject-matter* being at the same time carried on in a Court of equity and a Court of law, and to obviate much expense and annoyance to parties who, being sued at law, and having no answer at law, have a defence in equity, and who have now the opportunity of putting that defence on the record of the Court of law in which the action is brought. The *subject-matter* of this suit was confined to the debt I have referred to. Whatever defences were raised in that action had been tried and disposed of at the Assizes, and a verdict found subject only to the questions yet to be decided on the rule granted in *banc*.

The relief sought in this bill has not the remotest connection with the matter under consideration in that suit, and the proceeding is not between the same parties.

This is a bill filed by the creditors of Merrick generally, or, which is the same thing, by the plaintiffs on behalf of themselves and all other creditors, not only against the defendant Merrick, but against his wife, Alexander Manning, and the Federal Bank of Canada, with the view of impeaching a transaction alleged to be fraudulent.

The plaintiffs do not file this bill as judgment creditors seeking to remove some obstacle to their realizing the fruits of their litigation by legal process, but merely as one of a class—the creditors generally of Merrick—for a declaration that the impeached transaction is void. That, at least, is all the relief which could be granted; and if the bill had been filed by the plaintiffs alone, it would seem from the reported cases that the suit would have been improperly constituted. No doubt, under the recent Act, the Court



has ample powers of adding parties, but what interest would the other creditors have in the prosecution of a suit for the recovery of the debt claimed by St. Michael's College? And the same may be said as to adding the other defendants, all of whom, though necessary parties to this bill, would be obviously improper parties to the action at law, with which action, moreover, this suit has not necessarily any connection.

The learned counsel were unable to refer to any section of the Act which, by any possible rule of construction, could involve such a result, and we might dispose of the demurrer in favour of the plaintiffs so far as this objection is concerned without difficulty; but questions are so constantly arising as to the construction of this Act of Parliament, and so much doubt and uncertainty have been expressed as to some of its provisions, and the construction that some of the learned Judges have placed upon it, that it has been considered desirable that we should not confine our decision to the particular case under consideration, but should endeavour to state our views generally of the scope and intent of the enactment.

Under language very similar to that used in the Act now under review to be found in the Common Law Procedure Act, the power to plead an equitable defence was held to be merely permissive. If the defendant thought fit to plead such a plea he could not come into a Court of equity for an injunction to restrain the action on the very ground that he had made the subject of his equitable plea,—that is, if the case was one in which a Court of law could give relief by granting an unqualified and unconditional injunction.

If, on the other hand, the defendant did not choose to avail himself of the privilege of pleading his equitable defence at law, he could, as a matter of right, obtain an injunction in equity. Before the passing of the Common Law Procedure Act it was the only way in which the relief could be obtained, and then the party filing his bill would pray the relief, alleging that he had no defence at law. After the Act there were many cases in which the same

relief could be obtained at law as in equity, but as the Act merely gave an option to the defendant to plead such a plea, and did not impose upon him an obligation to plead it, the Courts of equity held that their jurisdiction was not taken away, and it was not open to them to place a construction upon the Act of Parliament different from what the words in their ordinary sense would bear.

Kindersley, V. C., in *Kingsford v. Swinford*, 5 Jur. N. S. 261, in placing an interpretation upon that Act, uses this language: "Am I to say that because you did not choose to plead the equitable plea, I will refuse you equitable relief? Is not that, in other words, saying that that which the Act of Parliament makes entirely optional shall, by this Court, be determined in this particular case as compulsory upon the defendant, and he shall not be entitled to that relief which, independently of the Act of Parliament, he would otherwise have had, because he does not choose to avail himself of the option which the Act of Parliament gives him?"

Of course there were many cases in which the defence could not be raised at law, as upon the construction of the Common Law Procedure Act the relief, which the Courts of common law could give, was confined to cases in which a Court of equity would grant an absolute, perpetual, and unconditional injunction, and to remove this defect in the law the third clause of the Administration of Justice Act was passed, and machinery provided in that Act to work out such a decree and in the same manner as had previously been done in the Court of Chancery in all cases in which that Court could grant relief; but although the Legislature uses the identical words in which the judgment of the Courts was couched when deciding that the power to plead at law was confined to such cases, and extends the right to plead any equitable defence whatever, the language used is still permissive,—still, I apprehend, leaving it optional with the parties to avail themselves of it or not, unless we are at liberty to disregard the well known rule as to the interpretation of the word "may" in an Act of Parliament, and the positive direction of the

Interpretation Act, which says it shall be construed as permissive.

Here are two statutes in *pari materia*, both intended to afford facilities for raising equitable defences in an action at law, the latter extending the remedy in consequence of the difficulty, which had been pointed out by the Courts, of dealing with an equitable defence, either on the ground that a Court of common law had no power to enforce a condition, or that the plea could not be dealt with in such a way as to do complete and final justice in reference to the subject-matter of the suit.

From the language used in the third section it is manifest that the framer of the enactment was endeavouring to remedy the defects which had been found to exist in the former Act, and it must, I think, be assumed that the Legislature were aware that the Courts which had so decided had also construed the former law as merely giving an option to parties to raise the equitable defence, if so disposed, in a Court of law, but not as imposing upon them an obligation to do so. If, in addition to extending the powers of making such defences, it had been intended to make it compulsory, it is but reasonable, I think, to assume that they would have used language plainly to indicate their meaning, and that having used the same permissive language, it must be held to have been done deliberately, and as indicating an intention to give defendants the power to choose the forum for the determination of their equitable rights, and not to leave it in the power of a plaintiff to compel his adversary to submit those rights to a Court of law, where they might not be so well understood, or might not be considered in the same way as they would by a Court of equity, where such questions are more familiar.

I come, then, to the conclusion, both upon the language of the Act, and because that language, in a similar statute passed with a like object, has already received a judicial interpretation, and has been retained in the present enactment, that it was still the intention of the Legislature, for

reasons which may readily suggest themselves, to give to parties the option of raising their defence in the pending suit, or to apply to a Court of equity to restrain the proceedings. That this must be the proper construction is still more obvious, I think, when we come to consider the 35th and following sections of the Act in reference to fraudulent conveyances. It appears to me to be an entire misapprehension of the Act to hold that a plaintiff is bound after judgment to take proceedings in the same Court in which he recovered his judgment for the purpose of impeaching a fraudulent conveyance made by the judgment debtor. These clauses, as I read them, give additional remedies to the plaintiff by summary application, in case he prefers that course to filing a bill or proceeding at common law. If he prefers the summary remedy he may apply to any Judge for a summons to shew cause why the lands should not be sold, as provided in these sections.

But whilst I think the language used in the Act indicates an intention on the part of the Legislature not to deprive the defendants of the privilege they previously possessed of submitting their rights to a Court of equity, and obtaining an injunction restraining the proceedings at law, it is incumbent upon a defendant either to take that course or raise his equitable defence at law before judgment, and that if he fails to do so the judgment will be as conclusive, both as to legal and equitable defences, as it was formerly in respect of those matters which would, if properly presented at the trial, have made out a good legal defence.

The bill, however, fails on other grounds. It was not necessary that the plaintiff should be a judgment creditor for the purpose of filing a bill to set aside a conveyance executed for the purpose of delaying, hindering, or defrauding creditors,—but the conveyance must be of property liable to creditors. A transfer or settlement of property which creditors cannot get at puts no property out of their reach, and cannot be fraudulent against them. The interest of Merrick in the contract was not an asset which his creditors could attach in any way or by any process, legal



or equitable, and there can be no pretence for setting aside the transaction, whatever it may have been (for it does not very clearly appear what it was), whereby that interest vested in his wife.

Not being a judgment creditor, there is no foundation laid for that portion of the prayer of the plaintiffs' bill which seeks for equitable execution, or something in the nature of equitable execution, against the moneys in Manning's hands, but *Horsley v. Cox*, L. R. 4 Ch. App. 92, appears to be a clear authority against such a bill being sustained.

I am of opinion, upon the second ground, that the demurrer should be allowed, and the appeal dismissed with costs.

PATTERSON, J. A.—The bill states in substance that J. D. Merrick owes a debt to the plaintiffs, for which they have an action pending against him in the Queen's Bench. They have a verdict for \$520 or thereabouts. A rule *nisi* has been granted to enter a nonsuit or verdict for defendant, and has been argued, but judgment has not been given. J. D. Merrick and A. Manning, as partners, were awarded by the Government of Canada a contract for the construction of a portion of the Welland Canal, at a price which promised large profits. J. D. Merrick and Sarah his wife conspired to defeat, hinder, or delay the plaintiffs in the recovery of their debt, and with that object J. D. Merrick induced Manning to admit Sarah in her husband's place into co-partnership with Manning "for the engineering and construction of the said works."

I do not pretend to understand this last allegation. I notice merely that it is not alleged that any change took place in the contract with the government; or that the wife either beneficially or nominally became a party to that contract, or that the husband did not and does not yet continue the joint contractor with Manning.

Then the bill shews that J. D. Merrick really continued

beneficially interested, and that the substitution of Sarah (whatever that substitution was) was merely a covinous contrivance to cloak his scheme for defrauding the plaintiffs of their debt: that Sarah was well aware of her husband's insolvency, and knew that the substitution of herself in the co-partnership was done solely with a view to the fraud on her husband's creditors; and that J. D. Merrick sold to Manning his interest in the partnership contract for \$10,000, selling it in his wife's name, and as her agent; and that Manning agreed to pay the \$10,000 to Sarah on the 1st day of November next after the filing of the Bill. It is further alleged that Sarah is, in respect of this agreement of Manning, merely a trustee for her husband.

The effect, so far, of what is told us of the dealings of the parties, is in short that J. D. Merrick, having a valuable interest in a contract, sold that interest to Manning for \$10,000, and Manning said he would pay the money to Merrick's wife, but as between the husband and wife the money was to be the husband's.

Then, by an amendment, we are told that the Federal Bank gave notice, after the filing of the bill, that they claimed an interest in or lien on the bond of Manning given to Sarah Merrick to assure payment of said purchase money, as assignees of Sarah Merrick.

There is no allegation that a bond was given. Such an allegation may be material or may not; but the pleader cannot reasonably ask us on this demurrer to aid his pleading by inferring that the debt in question was secured by a bond executed by Manning, binding himself to pay Sarah Merrick, and creating a legal debt due by him to her, when he merely informs us, as he does, that a notice was given which alluded to a bond.

The prayer is to restrain Manning from parting with or paying over to the defendants, or any or either of them, or to any person, the whole or any part of the money in his hands payable to J. D. Merrick, Sarah Merrick or the Federal Bank, in respect of the partnership transactions,

or of the bond : to declare the transaction fraudulent, and that the money is subject to the claims of the creditors of J. D. Merrick : for an account of the amount due to the plaintiffs from J. D. Merrick *by virtue of the said verdict* : and that Manning may be ordered to pay it out of the moneys in question : or that the plaintiffs may have equitable execution of the same : and for costs and further relief.

I have no doubt that the demurrer was properly allowed.

The plaintiffs have not established their claim by the recovery of a judgment at law. They do not ask to establish it in this suit. They ask an account, not of what is due, but of what is due by virtue of the verdict at law. I do not discuss the question whether in this suit they could have asked for an account of the alleged debt, a matter in which one of the defendants only is interested, and at the same time proceed for the other relief which they pray for. -Nor do I stop to consider whether it is necessary to have a judgment at law before a creditor can file a bill to set aside a conveyance which is fraudulent under the statute of 13 Elizabeth.

The plaintiffs cannot be in a stronger position than if they had a judgment. They shew by their bill that J. D. Merrick is their debtor, and that Manning owes him \$10,000, out of which they wish to have their debt paid.

There is nothing shewn in the shape of a conveyance from Merrick to his wife. There never was anything in the shape of an available asset until Merrick sold to Manning, and a debt from Manning was created. The bill shews that the introduction of the wife's name into the transaction was a fraud and a pretence, and that the debt was always due to the husband. What is there to set aside ? I have pointed out that there is no allegation that the wife ever, even nominally, took her husband's place in the contract with the Government, which alone was the subject-matter of the sale. Therefore Manning, in buying out the husband's interest, did not buy it as the interest of the wife. There is no such allegation in the bill. The

essence of all that is alleged is, as I have already said, that the husband sold his interest to Manning, who thereby became his debtor, and Manning at his request said he would pay the money to the wife.

The remedy of the plaintiffs is therefore by garnishing the debt, and not by any proceeding in equity, as is established by the case cited of *Horsley v. Cox*, L. R. 4 Chy. App. 92, and the cases which have followed that decision in our own Court of Chancery, and in this Court.

Even if a bond were shewn to have been given, it could apparently be directly reached by a *fi. fa.*, under sec. 261 of the C. L. P. Act, without the necessity for the interference of a Court of equity.

It has been argued before us that, setting aside the general want of equity, the demurrer should have at all events succeeded, because the effect of the Administration of Justice Act is to confine the plaintiffs to the Court in which their action for the debt is pending. I do not take that view of the statute.

I lately pointed out in *Victoria Ins. Co. v. Bethune* 1 App. R. 425, the length to which it then seemed to me reasonable to carry the supposed compulsory effect of the eighth section of the Act, and indicated an opinion which further consideration has convinced me was correct. I shall not repeat what I said in that case, nor shall I now make an examination of the clauses of the statute which bear upon the question, as that has been done by my brothers Burton and Moss, and we agree in our conclusions. I shall content myself with stating my views generally.

I find no satisfactory reasons for holding that the jurisdiction of the Court of Chancery has been abridged. I think that the judgment of a Court of law is made conclusive as to all matters which are in question in an action, whether those matters are brought in question by the declaration, the pleas, or other pleadings: that a judgment recovered at law cannot be impeached in equity any more than at law, on any ground which might have been



used as a defence to the action. But this does not involve the obligation to plead an equitable defence in the action at law. I think a defendant may still file his bill instead of pleading his equity, as he was always at liberty to do, the Common Law Procedure Act notwithstanding. If, however, a defendant prefers to resort to a Court of equity, he must do so before judgment is recovered against him.

In proceedings collateral to an action, and involving the adjudication of matters not in question in the action, the jurisdiction of the Court of Chancery remains as it was before the Act, although the Act does in some particulars, such *e. g.*, as those provided for by sections 35 and 36, give a concurrent jurisdiction to the courts of law.

Take the present case as an illustration. At law the matter in question is the alleged debt from Merrick to the plaintiffs. If the plaintiffs recover judgment, Merrick cannot afterwards be allowed to assert that that judgment shall not be enforced by reason of any matter, whether legal or equitable in its character, which might have been used either as a defence on the record, or as ground for restraining the action by injunction. If after judgment the plaintiffs find their execution impeded by any obstacle to remove which it would have been proper to resort to a court of equity, that remedy is open to them still. The permission given, as in sections 35 and 36, to proceed by what may be a simpler and cheaper process, does not exclude the concurrent jurisdiction of Chancery, and that Court can always, without disclaiming its jurisdiction, check the unnecessary adoption of the more expensive proceedings by its discretion in awarding or withholding costs.

I agree that the appeal must be dismissed with costs.

Moss, J. A.—The plaintiffs have appealed on the ground that the provisions of the Administration of Justice Act are not applicable to such a case as the present. The respondents rely not only upon the Administration of Justice Act,

but upon the contention that the bill fails to shew any equity, because it is in the nature of a garnishing bill, and the amount alleged to be payable by Manning is not liable to garnishment, nor is the alleged substitution of Mrs. Merrick for her husband a fraudulent transaction within the statute of 13 Elizabeth.

I am unable to agree with the view that this case is governed by the Administration of Justice Act. The contention, to which the Court below seems to have given effect, is, that when the plaintiff has commenced an action at law against a defendant, he must work out all his remedies against him in that action, however collateral they may be to its direct and immediate object, and although other persons and their rights may be concerned. It proceeds on the theory that even if before the Act the plaintiffs could have claimed this collateral relief in a Court of equity, they are now precluded from resorting to that forum.

I think that a consideration of the language of the Act, and of the inconvenience and mischief which it was apparently designed to prevent, shews that it has not the sweeping operation which such a view assigns to it.

The 8th section is that which is principally relied upon in support of this large construction. As it must be read in the light of its context and the apparent objects of the whole enactment, it will be proper to examine the other sections that are *in pari materia*.

The first section enacts that "The Courts of law and equity shall be, as far as possible, auxiliary to one another respectively for the more speedy, convenient, and inexpensive administration of justice in every case."

It may not be easy to define the precise meaning to be attached to this section, but it is not necessary now to make the attempt, for language which seems to give to each Court an auxiliary jurisdiction can scarcely aid an argument directed to the assertion of exclusive jurisdiction for every purpose in the Court which the plaintiff may have elected.

The second section permits a person having a purely money demand to proceed at law for the recovery thereof, although

his right may be merely equitable, but a discretionary power is given to transfer to the Court of Chancery, when the ends of justice so require. Obviously this section has no direct application to the case now in review, but it is to be borne in mind in dealing with the question of the scope of the statute.

The third section enacts that "Any party to an action at law *may*, by plea or any subsequent pleading, set up facts which entitle him to relief upon equitable grounds, although such facts may not entitle him to an absolute, perpetual, and unconditional injunction, and although the opposite party may be entitled to some substantive relief as against the party setting up such facts."

The 4th, 5th, 6th, and 7th sections enable the defendant in an action of ejectment to state by way of defence any facts which entitle him on equitable grounds to retain possession, and the plaintiff to reply upon equitable grounds or to demur.

The eighth section enacts that "For the purpose of carrying into effect the objects of the Act, and for causing complete and final justice to be done in *all matters in question in any action at law*, the Court or a judge thereof, according to the circumstances of the case, may, at the trial or at any other stage of an action or other proceeding, pronounce such judgment, or make such order or decree as the *equitable rights* of the parties respectively require, and may make such rule or order as to adding third persons as parties to any proceeding, striking out parties, or treating parties named plaintiffs as defendants, or parties named defendants as plaintiffs, and as to costs, and may direct such enquiries to be made and accounts to be taken as shall seem reasonable and just; and may as fully dispose of the rights and matters in question as a Court of equity could do."

The next six sections provide for an order of transference to the Court of Chancery, in case it appears to the Court of common law or a Judge that any equitable question raised in the action or other proceeding at law cannot be dealt with by the Court of law so as to do complete justice between

the parties, or may for some other reason be more conveniently dealt with in Chancery; and for an order that a Master in Chancery shall take accounts or make enquiries in an action at law.

In interpreting these sections it is proper to bear in mind the state of the law when the statute was passed. The Common Law Procedure Act had given a defendant who would be entitled to relief on equitable grounds against the judgment which the plaintiff might recover on the strength of his legal position, the right to plead by way of equitable defence the facts which would entitle him to such relief. As is well known, the construction placed upon this provision was, that in order to form the subject matter of a good equitable defence, the facts alleged must afford sufficient ground for a perpetual, absolute, and unconditional injunction. It was also decided by a series of authorities that the provision was merely permissive, and that the right to plead such a defence afforded by the Act did not preclude a party from resorting to a Court of equity. This construction was distinctly placed upon the enactment by *Kindersley, V. C.*, in *Gompertz v. Pooley*, 4 Drew. 452, and *Kingsford v. Swinford*, 5 Jur. N. S. 261. He might contest the action on any legal grounds that he conceived to be open to him, and afterwards come into equity for relief.

If he chose to plead an equitable defence, and there was no reason why a Court of law should not completely deal with it upon the merits, he was held to have elected his tribunal. But if the jurisdiction was not entertained at law on the ground that the plea was not authorized by the construction placed upon the statute, or if for some reason a Court of law could not give the relief which equity deemed appropriate, a bill to restrain the action might be sustained, although the plaintiff had in fact pleaded equitably. In *Jenner v. Morris*, 3 DeG. F. & J. 45, Lord Justice Turner seems to have rested the permissive and non-compulsory character of the right upon the familiar doctrine that the creation of a jurisdiction in courts of law cannot oust the jurisdiction of the Court of Chancery in matters originally within its cognizance.



In *Stewart v. Great Western R. W. Co.*, 2 DeG. J. & S. 319, the Lord Chancellor overruled a demurrer to a bill which sought to restrain a defendant from setting up a particular plea in an action at law, although the plaintiff might have met it by a replication alleging fraud.

The Lords Justices refused to entertain jurisdiction in the case of *Terrell v. Higgs*, 1 DeG. & J. 392, because the plaintiff in equity had pleaded an equitable defence, setting up substantially the same facts as in his bill, which was not filed until after a verdict had been found against him ; and because it appeared that although he had moved for an injunction before judgment was actually entered, he had not appealed against the Vice Chancellor's refusal of his motion until after judgment. But even in that case, so anxious was that eminent Judge, Lord Justice Turner, to guard against the notion that the jurisdiction had been necessarily encroached upon, that he remarked he was not prepared to say that in no case could an application be made for relief after a verdict at law on an equitable plea.

Sir Richard Kindersley, in *Waterlow v. Bacon*, L. R. 2 Eq. 514, held that the rule to be deduced from the cases was, that if a defendant in an action thinks fit to plead an equitable plea he cannot come into equity for an injunction, on the very ground that he has made the subject of his equitable plea ; provided always that the case is of such a nature, and the frame of the pleadings is such that the Court of law can and will give such relief as the Court of Chancery will give ; but if the Court of law cannot give such relief, or if from the mode in which the pleadings are framed the matter of the equitable plea may never come on for the decision of the Court of law, then the Court of Chancery will not refuse to entertain a bill for an injunction to restrain the action merely on the ground of the plaintiff in equity having pleaded such equitable plea in the action, though the Court in such a case would deal with the question of the costs of the action.

The same construction had been placed by our Courts on the similar provision in our Common Law Procedure Act.

When the Legislature in 1873 applied itself to the task of

amending the Administration of Justice, these cases had long been decided, and must be deemed to have been within its cognizance. A reference to the sections of the statute I have cited will shew that the immediate inconvenience which was designed to be remedied was the narrow construction of the Common Law Procedure Act, which, however well founded in judicial reasoning, had presumably frustrated to some extent the Legislative intention. A defendant who was willing to plead equitably, and to entrust the decision of his equitable rights against the plaintiff to a Court of Law, was liable to defeat on the ground that although his right to relief would be unquestionable in a Court of Equity, it could not be regarded, because some condition must be imposed ; in short, because it did not furnish the foundation for a perpetual, absolute, and unconditional injunction. The Legislature proceeded to remove this objection to the entertainment of equitable defences. This was the immediate object it had in view, and in effecting it it employed the very language which the Courts had used in prescribing the limits of a good equitable plea. Thenceforth a Court of Law was not to reject a plea because it did not contain facts entitling to an absolute, perpetual and unconditional injunction, or because it appeared from it that the opposite party might " be entitled to some substantive relief." In order to enable the Court of Law to deal effectually with such a plea, and to cause complete and final justice to be done in all matters in question in any action at law, the Court was invested with the powers stated in the ninth section. These powers extend no further than was necessary to enable the Court to effect the object which the natural and ordinary interpretation of the language would lead us to ascribe to the Legislature, namely, the granting of the opportunity to raise equitable defences without the risk of their being defeated on what appeared to be little better than a technical ground. That language is permissive in its character. By the express terms of the Interpretation Act it is to be so construed, unless controlled by the context ; and when to this consideration is added the use of such language after

the repeated and consistent judicial construction of the Common Law Procedure Act, it strikes me as an irresistible conclusion that the statute was not intended to make compulsory the raising of an equitable defence.

In my opinion the defendant whose rights are purely equitable may, instead of pleading, file his bill and resort to that forum which is specially concerned with such rights, and familiar with their administration. If he conceives himself to have some legal and some equitable grounds of defence, he may, I think, without prejudice to his right to invoke the aid of equity, contest the plaintiff's claim on legal grounds. But if he once permits final judgment to be recovered against him at law, I think that having regard to the whole scope of the Act that should be deemed unimpeachable in equity. It is almost unnecessary to add that if a party elects to plead equitably at all, he must set up every equitable ground which meets his opponent's case, and that an adjudication upon his equitable pleading could not be reviewed or questioned in equity. By its ample powers of dealing with costs and imposing other conditions, the Court of Equity can always prevent a party from being harassed by double litigation.

I venture to think that this construction of the Act is not only in harmony with its language, which is violently strained by making it compulsory, but prevents the difficulties and anomalies which are irresistibly suggested by the cases in which an opposite construction has prevailed.

But, with great respect, I think that the decision in question could not be sustained, even if the Act should be read as compulsory.

If a party is bound to plead equitably, he is still only bound to plead whatever may be necessary to meet his opponent's case or destroy his defence. The powers given to the Court of law of making such decree as the equitable rights of the parties require, and of adding persons as parties, &c., are expressly conferred to enable it to cause complete and final justice to be done in the matters in question in the action.

These matters must be brought in question by the pleadings, and even on the compulsory theory a party can only be held bound to ask for an order or decree of the kind mentioned in the ninth section for the purpose of obtaining the relief to which he might be entitled by allegations made on the record with respect to the subject matter of the suit.

It is only necessary to bear in mind that the subject matter of the action at law was the plaintiffs' claim that the defendant Merrick was their debtor, to perceive that the right set up by them in this suit on behalf of themselves and all other creditors of Merrick could not possibly have been therein brought into question.

If this were the only ground of objection to the bill, I think the demurrer must have failed.

But I think it equally clear, that upon the other ground argued before us the bill must fail. The allegations in the bill with respect to the obligation which Manning has assumed are by no means precise or specific. In one aspect it seems to be treated as a demand against him on account of the partnership. It is beyond question that if this be its character it cannot be reached by a bill in equity at the suit of a creditor. In another aspect it seems to be treated as a debt due in reality from Manning to Merrick, although nominally to Mrs. Merrick. If this be its character, the case is governed by the decision in *Horsley v. Cox*, L. R. 4 Chy. App. 92, which has been followed in this Court in *Gilbert v. Jarvis*, 16 Gr. 265. If this bill were sustainable, there would seem to be nothing to prevent a person from filing a bill against one whom he alleged to be his debtor, and any number of persons who were indebted to him for the purpose at once of establishing his claim against his debtor and attaching the debts due to him. For such a bill I know of no sanction either in legislative enactment or judicial decision, nor any authority either direct or inferential.

The amended bill alleges that subsequently to the filing of the bill the plaintiffs received notice that the defendants, the Federal Bank, claim an interest in or lien on the bond of the defendant Manning, given to Mrs. Merrick to assure



payment of the said purchase money. No further description of the bond is to be found in the bill. There is no distinct or direct allegation that such a bond was given by Manning. If under some conceivable state of facts the existence of a bond might give the plaintiffs a right to equitable relief, it is clear upon familiar rules of pleading that the defendants should not be required to answer a statement so vague, uncertain and inconclusive.

On this ground the appeal should be dismissed with costs.

*Appeal dismissed.*

SAMO ET AL V. THE GORE DISTRICT MUTUAL FIRE  
INSURANCE COMPANY.

Fol. 3 O.R. 234.

*Insurance—Misstatement as to incumbrances—Divisibility.* Rvr. 2 SCR 411.

The plaintiffs effected an insurance in the defendants' company on a manufactory and the stock contained therein. Their application was for an insurance of \$1,000 on the building, and \$2,000 on the stock, at 5 per cent. on each sum; and it stated that there were no incumbrances on the property, although there were several mortgages on the building. The risk was accepted at  $6\frac{1}{2}$  per cent., and a policy covering both risks was issued by the company, which acknowledged the payment of a premium of \$195.

The policy was made subject to 36 Vic. ch. 44, O. The proviso (since repealed by 39 Vic. ch. 7) to sec. 36 declared, "That the concealment of any incumbrances on the insured property, or on the land on which it may be situate, \* \* shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the Board of Directors shall see fit in their discretion to waive the defect."

*Held*, reversing the judgment of the Court of Common Pleas, 26 C. P. 405, HARRISON, C. J., dissenting, that the policy was divisible, the contract of insurance being distinct and separate as to each risk, and therefore that the plaintiffs were entitled to recover the insurance on the stock, although the policy was void as to the building.

The judgment was affirmed as to the insurance on the building being void. There was a covenant in the application, which formed part of the policy, that it contained a full and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, material to the risk and material to be known to the company. Per PATTERSON, J.A., the failure to disclose the incumbrances was not a breach of this covenant.

One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk.

*Semble*, per PATTERSON, J.A., that the omission to state the incumbrances was not necessarily the omission of any fact material to the risk.

THIS was an appeal from the judgment of the Court of Common Pleas, discharging a rule *nisi* to enter a verdict for the plaintiffs, reported in 26 C. P. 405. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The appellants' reasons of appeal were :—

1. That any misrepresentation or concealment as to incumbrances on the property insured was not made by the appellants to the respondents, but made by T. B. Griffith, who was not the appellants' agent in that behalf, or in any way the agent of the appellants, but was a stranger to the appellants, and was not authorized by them to sign any application for insurance, or the application on which the policy in question was issued.

2. That the appellants were not bound by the omission of Griffith to insert in the application for policy of insurance, professed to be made on the 18th of November, in the name of "Samo & Co., per T. B. G.," the encumbrances which the appellants had communicated to Rosenblatt; and the respondents or their local agent, receiving an application so signed, should have enquired as to the authority of Griffith to make such application.

3. That the policy in question must be deemed to have issued on some other application than that signed by Griffith, as the rate of premium contracted to be paid by the policy, or as consideration therefor, is different from that contained in the application signed by Griffith, and was determined on a personal inspection of the premises by respondents' personal agent.

4. That the 36th sec. of 36 Vic. ch. 44, O., as to concealment, does not make void a policy of insurance such as that in this case, on real and personal property, as to the personal property insured, by reason of concealment of incumbrances on the real property insured by the same policy.

5. That the clause in the policy, "If the insured is not the sole and unconditional owner of the property insured, unless the true title be expressed in the application, then

the policy shall be void," does not vitiate the policy in this case, as there was no application ever received by the respondents from the appellants, in which the true title to the property was not expressed.

6. That the policy in question in this case was divisible, and if divisible was only void as to the insurance on the factory, and not on the furniture and stock and personalty therein contained.

7. That the fourth replication to the defendants' second plea was proven to be true.

8. That the condition in said policy, or application, that the agent of the defendants was to be deemed to be the agent of the plaintiffs, was not just, and is an unreasonable condition, and should have been so held under and by virtue of the 36 Vic. ch. 44, sec. 33, O.: *Ramsay Woollen Cloth Manufacturing Co. v. Mutual Fire Ins. Co. of Johnstown*, 11 U. C. R. 516; *Date v. Gore District Mutual Fire Ins. Co.*, 14 C. P. 548; *Kuntz v. Niagara District Ins. Co.*, 16 C. P. 573; *Bleakley v. Niagara District Ins. Co.*, 16 Gr. 198; *Langel v. Mutual Ins. Co. of Prescott*, 17 U. C. R. 524; *Lindsay v. Lancashire Fire Ins. Co.*, 34 U. C. R. 440; *McCulloch v. Gore District Mutual Fire Ins. Co.*, 32 U. C. R. 610; *King v. Prince Edward County Mutual Ins. Co.*, 19 C. P. 134; *Sexton et al. v. Montgomery County Mutual Ins. Co.*, 9 Barb. 191; *Liberty Hall Association v. Housatonic Mutual Fire Ins. Co.*, 7 Gray, Mass. 261; *Masters v. Madison County Mutual Ins. Co.*, 11 Barb. 624; *Kelly v. The Troy Fire Ins. Co.*, 3 Wis. Rep. (Smith) 254; *Rowley v. The Empire Ins. Co.*, 42 N. Y. Rep. 557; *Phoenix Ins. Co. v. Lawrence et al.*, 4 Metcalf, Kentucky Rep. 9; *Clark v. New England Mutual Fire Ins. Co.*, 6 Cush. 342; *Trench v. Chenango County Mutual Ins. Co.*, 7 Hill, N. Y. 122; *Barnes v. Union Mutual Fire Ins. Co.*, 51 Maine 110; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio State Rep. 452; *Burrill v. Chenango County Mutual Ins. Co.*, 1 Edmonds' Sel. Cas. N. Y. 233; *Woodbury Savings Bank and Building Association v. Charter Oak Fire and Marine Ins. Co.*, 31 Conn. Rep. 517; *Rossiter v.*

*Trafalgar Ins. Co.*, 27 Beav. 377; *Carr v. Montefiore*, 5 B. & S. 408; *Angell* on Fire and Life Insurance, sec. 470, p. 511; *May* on Insurance, sec. 140, sec. 141, sec. 189, sec. 278.

The following were the respondents' reasons against the appeal:—

1. The only contract of insurance which the defendants made with the plaintiffs was founded upon the application signed by the plaintiffs, by the hand of T. B. Griffith. This application was filled up by Griffith by the direction of and from information furnished by Rosenblatt, who was the plaintiffs' agent. Rosenblatt was entrusted by the plaintiffs to fill up a blank application for insurance. Griffith was not the defendants' agent.

2. If the plaintiffs rely upon the contract contained in the policy, as they do, they must be bound by the terms of the application, which is a part of the contract.

3. If the plaintiffs repudiate the application, then there was no contract: *Fowler v. The Scottish Equitable Life Ins. Co.*, 4 Jur. N. S. 1169.

4. The concealment in the application, of the existence of the mortgages referred to in the evidence, avoided the policy.

5. The giving of the mortgage subsequent to the effecting of the insurance also avoided the policy: *Bruce v. The Gore District Mutual Ins. Co.*, 20 C. P. 207.

6. The condition of the policy, that if an agent of the company fill up an application he is to be considered as acting for the applicant, and not for the company, is not unjust and unreasonable: *Bleakley v. The Niagara District* 16 Gr. 198. A statement of a similar character forms part of the application.

7. The policy is not divisible: *Ramsay Woollen Cloth Co. v. Mutual Fire Ins. Co.*, 11 U. C. R. 516; *Butler v. The Waterloo Mutual Ins. Co.*, 29 U. C. R. 553; *Bleakley v. The Niagara District Ins. Co.*, 16 Gr. 198. 36th condition, on the back of the policy: *Brown v. The People's Mutual Ins. Co.*, 11 Cush. 280.



The case was argued on December 22nd, 1876.

*D. B. Read*, Q.C., for the appellants.

*J. Bethune*, Q. C., (*C. A. Durand* with him,) for the respondents.

The arguments were the same as in the Court below, and fully appear in the reasons for and against the appeal. The following additional cases were cited for the appellant: *Mallan v. May*, 11 M. & W. 653; *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 16 M. & W. 346.

June 27th, 1877 (*a*). PATTERSON, J. A. There is no reason to question the correctness of the decision now in review, so far as it relates to the effect of the want of information, or incorrect information, as to the incumbrances.

The only question is whether this effect is confined to the insurance upon the building which alone was affected by the incumbrances, or whether it vitiates also the insurance on the goods.

The agency being established, the application must be taken to be that of the plaintiffs, and the question for consideration has to be discussed on that basis.

The facts then on which the matter turns are that the plaintiffs made application (not under seal) for insurance, in the sum of three thousand dollars, as follows :—On their manufactory one thousand dollars, at the rate of five per cent., and on their stock contained in that building, which building was stated to be owned by them and of the cash value, exclusive of land, of eight thousand dollars, to the amount of two thousand, at the rate of five per cent.; and they gave the following answers to certain questions contained in the form of application :—“ 3. By whom and for what purpose is the building occupied? By us as a furniture manufactory: 29. What other insurance is there at present on the property? Two thousand dollars. 30. In what companies? Guardian. 31. What is your interest in the property to be insured? Owners. 33. Is property

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(*a*) *Present*.—BURTON and PATTERSON, JJ.A., HARRISON, C.J., and MOSS, J.A.

incumbered, and if so to what amount? None." And the application stated that they covenant and agree with the company that the answers which they have given are a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risks of the property to be insured, so far as the same are known to them and are material to the risk, and material to be known by the company, and agree and consent that the same be held to form the basis of the liability of the company, and shall form a part and be a condition of this insurance contract. Upon that application a policy is issued by the company, the only departure from the terms of the application being a change from five to six and a half per cent. And the policy, which acknowledges payment of the premium of one hundred and ninety-five dollars, contains the stipulation "that the application of the assured upon which this assurance is granted, the survey and diagram of the premises, and all things therein contained shall be taken and considered a part and portion of this policy ; \* \* that if the assured in the application referred to herein make any erroneous representation or omit to make known any fact material to the risk \* \* or if the assured is not the sole and unconditional owner of the property insured, unless the true title be expressed herein \* \* then and in every such case this policy shall be void."

The building was subject to several mortgages, and another was made by the plaintiffs after the effecting of the insurance. None of the mortgages were mentioned to the defendants. The goods were unencumbered.

The first plea is *non est factum*. The second sets out the stipulation in the application which I have extracted, and which is there called a covenant, and avers the existence of several mortgages at the date of the application, and that that circumstance was material to the risk and to be known to the defendants. The third plea alleges that the plaintiffs concealed from the defendants the incumbrances which were upon the land on which the property insured was

situated, whereby by force of the statute the policy was void. The fourth plea is confined to the insurance of one thousand dollars on the building, and relies on a mortgage made after the insurance, and the fifth plea sets up the same mortgage as a defence to the whole claim. Issue is joined on the pleas, and there are special replications which it is not important to note.

At the conclusion of the evidence at the trial, the parties agreed to submit the case on the evidence to the Court, and the jury were discharged.

Nothing was said in evidence on the subject of the information respecting the incumbrances being material to the risk or material to be known by the defendants.

The third plea is founded upon the 36th section of the Act of 1873 (36 Vic. ch. 44, O.) which provides (*inter alia*) that "The concealment of any encumbrance on the insured property, or on the land on which it may be situate \* \* shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the Board of Directors in their discretion shall see fit to waive the defect."

As already observed, it is beyond question that the defendants must succeed on this plea, as to the building which was encumbered by the mortgages. But they contend that the policy is altogether avoided, and that the plaintiffs cannot recover even for the goods which were unencumbered. A very important question is thus raised, which will require a careful consideration of the law.

We must not allow ourselves to be embarrassed by the fear of interfering with the contract of the parties. We find the argument sometimes used that the parties have chosen to unite two subjects in one policy; that we must not assume that the company would have taken a risk on one without the other; and that therefore to hold that the policy remains valid as to one while void as to the other, is to bind the company by a contract which they did not make. This is a very good argument when the facts admit it. In the present case we have not an entire contract in the sense necessary to make the argument necessarily conclusive.

The application is part of the policy, and the application is for separate insurances at separate rates and in separate sums, though they are covered by the one policy. The application would have been satisfied by the issue of two policies, one on the goods and one on the building, as well as by one policy covering both.

We are driven then to the terms of the contract itself. These terms, so far as they touch the present point, are to be found not on the face of the policy, but in the statute. Whatever the statute declares, that is the contract. There is no attempt to frame a contract apart from the statute, except in one particular which I shall notice hereafter, and which is not in issue at present. I therefore proceed to examine the statutes which affect this question.

The first Act authorizing the establishment of mutual fire insurance companies in the several districts of this Province was passed in 1836 (6 Wm. IV. ch. 18). Between that date and 1873 numerous amending Acts had been passed, under which the law had been so essentially altered that but little remained of the original idea of a local mutual insurance company. The Act of 1873 (36 Vic. ch. 44, O.), passed "to consolidate and amend the laws having reference to mutual fire insurance companies in the Province of Ontario," established a law differing in several respects from that which existed under the earlier Acts. A leading feature of the original law was the lien created by the statute upon buildings and land to secure the payment of the premium note. By sec. 4 of 6 Wm. IV. ch. 18, the members of the company were empowered to "mutually insure their respective dwelling-houses, stores, shops, and other buildings, household furniture and merchandise." Section 12 required the deposit of the premium note before the issue of the policy; and section 13 declared that the interest of the insured in the building insured, the land on which it stood, and adjacent lands which should be mentioned and declared liable in the policy, should be pledged for the payment of the notes. Section 17 enacted that a policy, executed as there directed, should "be deemed valid



and binding on the said company, in all cases where the assured had a title in fee simple, unencumbered to the building or buildings insured, and to the land covered by the same;" but that if he had a less estate or the premises were encumbered, the policy should be void, unless his true title and the encumbrances were expressed in the policy and in the application therefor. Under section 19 the policy became void upon the alienation of any house or other building, and was to be surrendered to be cancelled, subject to a power to assign the policy to the grantee. By section 20 an alteration in a house or building, increasing the risk or hazard from fire, avoided the insurance on such house or building, unless an additional premium were paid; and section 22 made void the insurance in the company, if insurance on any house or building subsisted in the company, and in any other office at the same time, unless the company consented to the double insurance. In all this the building or the land is the main subject of attention. Apparently the household furniture or merchandise has been thought of only as insured in or along with the building which contained it, and as part of the same insurance. The inference is not unreasonable that in this the Legislature had in view the security for the premium note, and intended that when the requirements of the Act were infringed or unfulfilled with respect to the title to the land which was pledged to secure the note, the whole policy on goods as well as buildings should fall, and that the liability on the risk as to the goods should not continue after the security for the premium was gone.

Some provisions of the Act may not at first sight appear consistently to support this view. Thus sec. 20, in the event of an alteration which increased the risk on a building, did not avoid the *policy*, but only the *insurance on the building*. Under sec. 22, if *insurance on any house or building* subsisted in the company and in any other office at the same time, the *insurance* made by the company became void, which I should have understood to mean the insurance on the house or building, had not the Court of

Queen's Bench held that it meant the whole policy : *Ramsay Woollen Cloth Co. v. The Mutual Ins. Co. of Johnstown District*, 11 U. C. R. 516. And sec. 5 expressly recognized the right to insure property movable or immovable, although the owner of such property was not a freeholder in such district. These provisions however do not necessarily conflict with what seems the general scheme of the Act. If the risk on building and contents was under this scheme one insurance, the effect of avoiding the insurance on the building under sec. 20 or 22 would be to avoid the policy. And I apprehend that the recognition of the right to insure movable property in section 5 was not intended to enlarge the class of insurable goods mentioned in section 4, viz., household furniture and merchandise, which would naturally be contained in insurable buildings, or to imply that such property was intended to be insured apart from the building which contained it; but only to make it clear that although the organization of the company and the original insurances under sec. 2 must be by freeholders of the district, yet the right to insure and to become members of the company was not to be confined to persons whose lands were of that tenure.

If movable property were to be insured apart from buildings, not only would there have been no security for the premium note, but the terms of sec. 17, which declared that a policy signed by the president and countersigned by the secretary should be valid and binding on the company when the insured was seized in fee, would have had no application. It may be said that sec. 17 evidently refers only to policies on buildings, as it is made to do in express words in Consol. Stat. U. C. 52, sec. 27, and that a valid policy on goods might be made under the seal of the company without the aid of that section. This objection, however, rather enforces than answers the argument that no policy was contemplated in framing the statute which was not a policy on a building.

The amendments prior to 1873 greatly enlarged the scope and powers of these companies, giving them, amongst other

things, the power of ordinary stock companies, by authorizing the subscription of stock under the name of guarantee capital, and the issue of policies on the cash system, such as that now before us. The changes were made from time to time by additions and amendments, without any express enactment professing to vary the general scheme which I have discussed. .

The Act of 1873 (sec. 51) does not permit policies to be issued by companies formed under that Act, otherwise than on the mutual principle. But it leaves existing companies untouched in this particular, and makes a radical change in the principle of the law affecting all the companies, by discontinuing the lien on buildings or lands for securing the payment of the premium note. It also extends the subjects of insurance, giving power by sec. 34 to insure against loss by fire or lightning, "dwelling-houses, stores, shops and other buildings, household furniture, merchandise, machinery, live stock, farm produce, and other commodities."

Nothing can be found, either in the apparent object or express enactments of the statute, to preserve the idea of a policy necessarily including a building. The contrary is the case, and there can be no question that under this Act buildings and goods stand on the same footing. As subjects of insurance, they are entirely independent of each other; either may be insured without the other; and unless the express terms of sec. 36 had the effect, there is no reason disclosed, either by the language or the policy of the Act, why a defect in or concealment respecting the title to one should affect the insurance upon another which happened to be covered by the same policy.

I have not thought it necessary to examine the state of the law under the numerous amending Acts before 1873, or to enquire under what enactment the companies began to insure goods apart from the buildings that contained them, though I am aware that they did so on the mutual as well as on the cash system. I have confined myself to the original Act, because I have to consider how far the construction of the language of the Act of 1873, when it

resembles that used in the original Act, is to be influenced by the abrogation of the governing principle which that Act established, and which the amendments left unrepealed, however it may have been overlaid by the altered scope and enlarged powers which they created.

The section of the Act of 1873 principally in question is sec. 36. It takes the position occupied by sec. 17 in the Act of 1836. A slight comparison of the two sections will show that, setting aside the change of principle, the new section, while using some of the language of the old one, is conceived with a very different idea, and must be read independently. The sec. 17 made a policy valid and binding if signed by the president and countersigned by the secretary (dispensing with the seal), in all cases where the title to the buildings insured was what the statute required. The sec. 36 requires not only a seal but certain other formalities to make a policy binding in any case. Its words are, "All policies of insurance issued by the board of directors, sealed with the seal of the company, signed by the president or vice-president, and countersigned by the secretary or acting secretary, shall be binding on the company," The sec. 17 provided that if the assured had a less estate than a fee, or if the premises were encumbered, the policy should be void, unless the true title and the encumbrances were mentioned in the policy and in the application. The sec. 36 had a proviso which avoided the policy by reason of certain things which might exist at its date, or by reason of defaults, which might afterwards occur. This proviso no longer exists, having been wisely repealed by 39 Vic. ch. 7, but it was in force when the cause of action in the case before us accrued. The words were :—

"Provided that any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or ownership of the applicant or his circumstances, or the concealment of any encumbrance on *the insured property*, or on the land on which it may be situate, or the failure to notify the company of any change



in the title or ownership of *the insured property*, and to obtain the written consent of the company thereto, shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors in their discretion shall see fit to waive the defect."

The question is, whether this proviso must be so read that a policy insuring several subjects of insurance becomes void as to all of them by reason of any of these enumerated "defects" existing as to any one. The expression "insured property, or the land on which it may be situate," seems to have been adopted as the equivalent of the words "building or buildings insured, and the land covered by the same," in sec. 17 of the Act of 1836, and this might be taken as a reason for reading "property" as meaning *building*, were it not that the more general term was evidently employed in view of the change of principle to which I have adverted.

As the insurance of goods without the insurance of the building containing them is now contemplated; as the premium is no longer secured by a charge on the land; and as the protection intended by the provisions of the clause would fail unless those provisions applied directly to every subject of insurance, it is clear that we must read the word "property" in its ordinary sense, although the words "the land on which it is situate" may only be applicable to one species of insurable property, namely, buildings.

To illustrate the effect of holding a policy upon several separate subjects indivisible, let us suppose that the one instrument covers an insurance on a dwelling house for five thousand dollars, on household furniture for two thousand, and on a piano for four hundred dollars. The piano may be in the insured building, or in a house miles away, for the clause will have the same operation in either case. And suppose the policy to cover also the live stock which never approach the dwelling house. It happens that the piano is not quite paid for, and under a form of contract which is familiar to us all, the ownership is still in the vendor, but the application has by inadvertence described the assured as owner of all the property. If the house and

furniture are burned, or an ox is killed by lightning, nothing can be recovered. I may say, in the words used by Mr. Justice Wilson when discussing an analogous question in *Date's Case*, 14 C. P. 554: "It is a very serious proposition, and if it be the law it would be a fit subject for legislative correction, at the earliest possible moment."

I do not think the clause must necessarily be read as contended for on the part of the defendants. It is framed in terms which on their face seem to contemplate a single subject insured in a single policy. The expression is always "the property," never using such words as "or any part thereof." A concealment of an incumbrance on *the insured property*, or a change of title or ownership of *the insured property*, is to render void the policy.

A policy is the instrument by which the property is insured. Reading thus, "A change of ownership of the insured property avoids the instrument by which it is insured," does no violence to the language, while it puts it in essentially the same form in which the language of sec. 17 of the Act of 1836, as imported into Consol. Stat. U. C. ch. 52, sec. 27, was read by the Court of Common Pleas in *Date's Case*, under which that Court held that the insurance on certain goods was not vitiated by reason of an undisclosed encumbrance on a house insured under the same policy, but not being the house which contained the goods.

In my opinion *Date's Case* was decided on a correct construction of the statute. I understand the effect of that decision to be, that while under the old law the insurance on goods contained in a building which was also insured, and which was charged under the statute as security for the premium on both building and goods, would be vitiated by a defect which under the statute avoided the insurance on the building, yet, where the element of security for the premium was not involved, the mere fact of association in the same policy did not prevent one insurance standing good while the other was void, notwithstanding the statutory declaration that "the policy shall be void." It is true that Mr. Justice Wilson, in giving judgment in *Date's Case*,

based his argument to some extent on the form of words, "policy *thereon*," used in one part of sec. 27 of Consol. Stat. U. C., ch. 52. But those words only expressed what was the plain effect of the language of the original sec. 17 of the Act of 1836. They made no change in the law. And when we read in sec. 36 of the present Act, that if the ownership of insured property is changed, the policy shall be void, it would be an affectation of precision quite out of place in construing one of our statutes to say that the meaning would be different if the words were "the policy *thereon* shall be void." To hold a policy under this statute indivisible, we must, in my judgment, overrule the decision in *Date's Case*, and this in construing a statute passed since that decision, and which, as far as the particular point now in discussion is concerned, re-enacted the law without essentially varying the language.

We find in the Act the words "policy" and "insurance" used almost interchangeably. By sec. 37, in case of double insurance, the *insurance* in the company shall be void. By sec. 40, an alteration which increases the risk avoids the *insurance* on the building or property which incurs the additional hazard. By sec. 39, alienation of any property, real or personal, avoids the *policy*, which is to be surrendered. subject, however, to a power to assign it to the grantee on his assuming the payment of the premium note. This clause, like every other touching policies, takes no note of the case of one policy covering two properties, only one of which may be assigned.

I am satisfied that the construction of section 36, which should be adopted as the one which accords with the general tenor and intention of the statute, which avoids the injustice for which a different construction would open the door, and which is a fair and reasonable rendering of the clause itself, is attained by reading the words "shall render the policy void," as meaning "shall render the *insurance thereon* void." An additional reason for this appears when we remember that insurances are usually effected in the first place by interim receipts, and exist for

some time before any policy issues. The strict and literal reading of the word "policy" would require us to hold that the insurance would be good while it depended on the receipt; and that the statute only applied to avoid it for misrepresentations or concealment after the issue of the policy. In *Hawke v. Niagara District Ins. Co.*, 23 Gr. 148, Proudfoot, V. C., read "policy" as meaning "insurance" or some equivalent.

I have a strong impression that a policy like that before us, which is issued on payment of a cash premium, and whose only relation to the mutual system is the circumstance that it is issued by a company incorporated under the Mutual Insurance laws, would be found, upon the true construction of the old laws as applicable to such a policy, to be divisible; but it is not necessary to consider closely how that may be, because every argument in support of that position applies *a fortiori* under the new law.

I am not aware of any case in which the Courts have had to construe the sections of the statute now in question, either sec. 17 of 6 Wm. IV., ch. 18, sec. 27 of the Consol. Stat. U. C., ch 52 or sec. 36 of the Act of 1873, except *Date's Case*, to which I have just referred.

Three other cases in our Courts have been referred to, namely: *The Ramsay Woollen Cloth Co. v. The Mutual Fire Ins. Co. of the Johnstown District*, 11 U. C. R. 516; *Russ v. The Mutual Ins. Co. of Clinton*, 29 U. C. R. 73, and *Bleakley v. The Niagara District Mutual Ins. Co.*, 16 Grant 198. In the *Ramsay Woollen Cloth Co.'s Case*, and in *Russ's Case*, the question turned chiefly, if not altogether, on stipulations contained in the policy itself. The same thing is true of all the American cases I have seen, and I have looked at all those cited to us, and a good many more. *Russ's Case* turned altogether on a clause in the policy. In the *Ramsay Woollen Cloth Co.'s Case*, besides a clause in the policy concerning double insurance, section 22 of the statute 6 Wm. IV., ch. 18, was discussed, that section dealing also with the same subject of double insurance. The



policy in that case covered a building which was insured for £25, machinery in it for £75, and the stock in the same building for £400. The defence set up a double insurance on the building and machinery as vitiating the whole policy, as well on the stock as on the subjects of the double insurance, under a condition contained in the policy itself, that in case of double insurance on the premises or property insured, the policy granted thereon by the company should be void; and under the 22nd section of the statute, which, in case of double insurance on a house or building, declared that the insurance made by the company should be deemed and become void. In giving judgment, Robinson, C. J., dwelt on the reason which suggested the condition, viz., that over insurance might supply a dishonest mind with a motive for setting fire to his own property, and on the principle which he considered to require that the policy in question was vitiated in whole, and he added "If it would make any difference that the premises insured were wholly unconnected, so that any casualty affecting one could not endanger the other, yet this clearly is not such a case. \* \* Besides, the peculiar nature of these mutual insurance companies, the notes which the persons insured have to give, the interest they acquire in the company, and the arrangements to be made for paying losses, all depending on the amount of the policy, seem to imply additional reasons for holding the policy altogether avoided by the breach of the condition in question, rather than that it should, like an award in such cases, be upheld as to part and avoided for the remainder. That effect would seem to me to be in accordance with the literal import of the 22nd clause of the statute, and not irreconcilable with the words of the condition, besides being consistent with those principles which are in general strictly maintained in regard to warranties and conditions in such cases, and with those maxims of the common law which usually represent fraud as vitiating a contract wholly, and not merely in that part regarding which any misrepresentation or concealment may have been practised."

Burns, J., in giving judgment to the same effect as that of the Chief Justice, said, "What effect might be given if there were several properties included in one policy upon which there were several and separate sums taken, and at the same time apparently separate and distinct risks, it is not necessary to say."

I am not at present concerned with the question whether the decision in that case, depending as it did upon the terms of the policy itself, as well as upon a clause of the statute different from that before us, and framed (as assumed in that judgment) to guard against the special risk of over-insurance, rests on reasoning that is wholly impregnable. I notice merely that it was not decided that the force of the words of either the statute or the condition, apart from the principle supposed to be involved, would have made it imperative to hold the policy indivisible.

On the contrary, we find Draper, J., during the argument, pointing out the anomalies which would arise from that construction. He said:—"Suppose two houses, one with goods in it, and one with machinery; that a double insurance is effected on the house with the goods, and that the other is burnt; then could there be no recovery for the house burnt, because of the second insurance on the other?" Counsel answered "No; that is the effect of the statute." But in *Date's Case* it was afterwards otherwise decided. Again, Draper, J., said:—"Then suppose a building insured and that the goods in it are afterwards insured by a separate policy, and then doubly insured and burnt; you must admit, according to your argument, that the policy on the building would not be vitiated because it is separate." Counsel replied, "Yes;" and Draper, J., added, "And yet the temptation to burn the building would be increased."

The next case was *Date's Case*. The decision in it answered the suggestions made by Draper, J., and those to which Robinson, C. J., and Burns, J., in their judgments mentioned only to say that they left them undecided, by expressly holding that the force of the language of the sec. 17 was not such as to prevent the policy from being divisible.

Then came *Russ's Case*, 29 U. C. R. 73, which arose not upon a clause of the statute, but upon a condition in the policy that "whenever any one hereafter insured shall alienate conditionally by mortgage his policy shall be void unless," &c.

Richards, C. J., said :—"It is not disputed that the defendants have a right to make such a condition in granting their policies, nor do I understand that the plaintiff disputes, if the effect of what he has done is in truth to alienate conditionally by mortgage the property insured, that the condition applies, and the policy is void. \* \* Looking at the whole scope and tendency of mutual fire insurance companies, and the mode in which their risks are taken, and the preceding part of the condition, I should infer the alienation referred to was the land on which the insured premises were situated. I think that is the fair interpretation to be given to the condition. That being so, it seems to me the policy must be void, not only as to the buildings, but also as to the furniture."

In *Bleakley v. Niagara District Ins. Co.*, 16 Gr. 198, it appeared upon the hearing before the present Chancellor that a barn, one of the insured buildings, was not affected by the encumbrances on which the defence rested. His Lordship was asked to amend the bill by setting up that fact so as to enable the plaintiff to recover *pro tanto*. He refused, because it did not appear to him that the plaintiff would be entitled to recover. This decision is not placed on the reading of the statute, but upon the view taken of the contract by the parties. The learned Chancellor said : "Insuring in the way that the plaintiff did insure, several buildings in one policy, there was a fact which he was called upon to disclose, and I must see clearly that as to the barn, at any rate, its non-disclosure was immaterial—that it could not be an element in the consideration of the assurers whether they would assure or not. I cannot see this; on the contrary, I can understand assurers refusing to take a risk on a building because of there being a mortgage on another belonging to the same person within a dis-

tance not free from risk." There is nothing in the language used in the judgment to indicate that if the barn had been ten miles away, the wording of the statute would have prevented the contract being treated as divisible, as it was in *Date's Case*.

The American cases generally treat the question of construction on much the same principle as that which seems to me applicable under our statutes. A leading case seems to be *Friesmuth v. Agawam Mutual Fire Ins. Co.*, decided in the Supreme Judicial Court of Massachusetts, and reported in 10 Cush. at p. 587. By the law of Massachusetts, the policy created a lien on the interest of the person insured in the building insured, and after 1849, in personal property also, provided the extent of the liability and the intention of the corporation to rely upon the lien were set forth in the policy.

The ground of decision in *Friesmuth's Case* is thus stated by Bigelow, J.: "The contract of insurance on the part of the defendants was not distinct and separate on each class or subject embraced in the policy. It was separate and distinct only so far as to limit the extent of the risk assumed by the defendants on each kind of property. In all other respects it was an entire contract. This is manifest from the fact that the premium and deposit are designated as entire sums, without any reference to the different kinds of property covered by the policy or the separate sums insured on each. There is nothing in the application or policy from which it can be ascertained how much of the deposit note was made up of the rate of insurance charged on the real estate, and how much of that on the personal property. The consideration of the contract was regarded by the parties as an entirety of which they did not contemplate a separation or apportionment. It was in consideration of the entire sum for which the deposit note was given, and the liability of the assured to assessments on that amount in case of losses, that the defendants assumed all the risks contained in the policy. They had the right to look to their lien on each and all of the



different kinds of property insured by them for the security of the whole amount of the deposit note, and such, in fact, is the express agreement of the parties in the policy, by which it is stipulated that it is the 'intention of this corporation to rely upon said lien for the payment of any and all assessments on said deposit note to the full extent of said note.' This is not a case, therefore, of an insurance of different kinds or species of property to a specific amount with a separate premium and deposit charged and designated as belonging to each, for which a distinct lien can be asserted; but it is an insurance for an entire consideration when the lien attaches to the whole property to secure the full amount of the deposit note. \* \* \* In this view the representation as to encumbrances on a part of the property was material, because it affected the security of the defendants both as respects the solvency of the plaintiff and the validity of their lien; and it being admitted that the statements of the plaintiff in this respect were untrue, the case comes within the principles recognized and established in previous decisions of this Court already cited."

*Brown v. People's Mutual Ins. Co.*, 11 Cush. 281, was decided by the same Court on the same principle. In the judgment it is said the "answer misrepresented the facts as to the incumbrances, omitting wholly to state the mortgage to Joseph Perkins for eleven hundred dollars. This was such a misstatement as renders the policy void under the by-laws of the company. The contract being entire, and one premium note being given, the lien for the security of the same was affected by the misstatement. For this reason and upon the ground of misrepresentation, and the effect of it as stated in the case of *Davenport v. New England Mutual Fire Ins. Co.*, 6 Cush. 342, judgment must be entered for the defendants."

In *Gould v. York County Mutual Fire Ins. Co.*, 46 Me. 403, Tenney, C. J., puts the decision on the same grounds as the Massachusetts cases: "The contract being entire, and one premium note given, the lien for the security of the same was affected by the erroneous answer."

The Massachusetts decisions seem to have governed the Courts in the other States, and to have been adopted without much addition being made to the arguments by which they were supported, even when the circumstances were possibly distinguishable.

Thus *Gottzman v. Pennsylvania Ins. Co.*, 56 Penn. 210 in which a judgment was delivered much superior in ability to most of those which I have read on this subject, relies on *Friesmuth v. Agawam*, 10 Cush. 587, *Brown v. People's Mutual Ins. Co.*, 11 Cush 280, and two other judgments pronounced by Bigelow, J., in *Lee v. Howard Fire Ins. Co.*, 3 Gray 583, and *Kimball v. Howard Fire Ins. Co.*, 8 Gray 34, which last two cases turned on the wording of the policies, which in certain events provided that "these presents shall cease and be of no force or effect;" and so of *Smith v. Empire Ins. Co.*, 25 Barb. 497, which follows *Brown v. People's*; and so of *Lovejoy v. Augusta Mutual Fire Ins Co.*, 45 Me. 472, which follows *Friesmuth's Case*; and so of a long chain of others.

So far I have discussed the general question of the construction of the statute without special reference to the facts of the case before us, and the conclusion so far reached is that neither does the phraseology of sec. 36 nor the principle of interpretation applied to the analogous provisions of the earlier Acts, nor any principle to be derived from decisions elsewhere, compel us to read the word "policy" or to construe the clause in the strict and indivisible sense contended for; while, as the same construction given in one case must be given in another, the construction of a general statutory provision not being in this respect necessarily that which would apply to the same words occurring in a policy, where they might not improperly be read as forming a distinct contract with reference to that particular insurance; and as the construction contended for would clearly open a door for injustice; the reading should be adopted which avoids only the insurance on the particular subject regarding which the "defect" exists.

Is there any reason why a different reading should be applied in the present case?

The argument is, that the building and goods were involved in one hazard, and therefore the contract should not be separated. But whatever force this argument may have when the contract is found on the face of a policy in which the two subjects are insured, it would be impossible to give effect to it here, unless we are prepared to do so when no common hazard exists. We should, in fact, be importing into the statute something which is not found there, and which cannot be imported into it without involving the anomalies pointed out by Draper, J., in the *Ramsay Woollen Cloth Company's Case*, to which I have referred.

In this case there are in effect two risks taken by the company—one on the building for one thousand dollars, and one on the goods for two thousand dollars.

The application is for insurance for three thousand dollars, being those two separate sums, and the rate of premium is marked separately against each. The application is for insurance at five per cent. The policy is at six and a half. It happens that the rate applied for was the same on the building and the goods, and that the risk was taken at the same rate on both. That, however, is an accident only. If circumstances required it, a different rate upon each would have been exacted and paid, as it was in *Date's Case*, already noticed.

The transaction is really a separate insurance upon each subject; and the result of my opinion is that while under the Statute the insurance on the building is void, that effect does not extend to the insurance on the goods.

I am therefore clearly of opinion that the plaintiffs are entitled to recover for the loss on their goods, notwithstanding anything alleged in the third plea.

The same reasoning applies to the fifth plea, and leads to the same conclusion.

The fourth plea does not touch the insurance on the goods.

The second plea is the only one that remains to be noticed. It avers that the existence of the undisclosed

mortgages was a circumstance *material to the risk, and to be known to the defendants*, and sets up the failure to disclose them as a breach of the agreement in the application which I have already quoted, viz., that the application was a just, full, and true exposition of all the facts and circumstances in relation to the *condition, situation value, and risk* of the property, so far as the same were known to the plaintiffs, and were material to the risk, and material to be known by the company.

In my opinion, the existence of an encumbrance on the building is not a fact or circumstance in regard to the condition, situation, value, or risk of the property; and so the objection taken by this plea does not come within the stipulations which the plea sets out. I am unable to concur in the contrary view, which I am aware has been held in some American cases.

I regard the *condition* of a building as meaning the state of repair—its tangible and visible state—the result of the nature, position, sufficiency or insufficiency, preservation or decay of the materials used in its construction. *Situation*, I read as referring to its local position, including perhaps its distance from other buildings. *Value* of course means either cost or saleable value; and *risk* I take to mean exposure to danger from accidental fire.

It may be possible, by great astuteness, to maintain that the state of the title can be expressed by some signification of the words condition, situation, value, or risk; but we must remember that these are the words of the company.

The company requires, by its form of application, that the applicant shall answer certain questions, and shall covenant that he has given a true exposition of all the facts and circumstances in regard to the condition, situation, value, and risks of the property. The company receiving that covenant must receive it in the sense in which those from whom it was required would naturally understand the words in which the company framed the document. No one would ever suppose he was asked in those words to covenant concerning his title. If that was intended,



nothing would have been easier than to have made the matter plain by adding the words, title and encumbrances. The true principle, as remarked by Mr. Chancellor Kent, appears to be, as far as practicable, to give to a contract that particular sense in which the person making the promise believed the other party to have accepted it: *Kent's Com.* 507. No one can for a moment suppose an applicant signing this form of application ever believed that the company took so indirect a way to express title or encumbrances, or accepted the covenant understanding that to the obvious and ordinary meaning of the words used, the further and by no means obvious meaning was added.

Still, the plea may be read as alleging a breach of the condition contained in the body of the policy, and set out in the declaration, that the policy should be made void by the omission to make known *any fact material to the risk*.

Whether the existence of the mortgages was a "fact material to the risk," is a question of fact, and like all other questions of fact has to be decided on the evidence. The onus of establishing it is on the defendants. I do not find a word in the evidence which I could leave to a jury as evidence of this fact. We have no information of the value of the property in relation to the amount of the encumbrances, or any materials on which to form a judgment as to whether, (assuming the words to extend beyond the mere hazard from accidental fire), the existence of the encumbrances would or would not have probably influenced the acceptance of the risk, or affected the rate of premium. It is scarcely necessary to cite authorities for the proposition that the jury must pronounce on the materiality of a statement or omission; but I may refer to *Lindenau v. Desborough*, 8 B. & C. 586, and to *Jones v. Provincial*, 3 C. B. N. S. 65.

The Court cannot be asked to find facts without evidence, any more than a jury; but if an opinion had to be given, I should not have much hesitation in expressing mine, that the omission now in question was not of any fact material to the risk, within the meaning of the condition. I understand the word risk to mean hazard from

the dangers insured against. Section 34 points out what these dangers are—namely, damage or loss by fire or lightning, whether the same happens by accident or by any other means except that of design on the part of the insured, or by invasion of an enemy, or by insurrection. I stated this view in *Williamson v. Commercial Union, Ins. Co.*, 26 C. P. 591; and it is in this case satisfactorily confirmed by the defendants themselves, for in the form of application they keep distinct the two aspects in which information may be material viz: material to the risk, and material to be known to the company.

The state of title may be material to be known by the company, without being material to the risk, as I understand those words; but I should be slow to assume that in either respect the title to the realty was material to the acceptance of a risk upon the goods. My views in this matter are not quite in accord with what might seem to have been the opinion of the Chancellor, in *Bleakley v. Niagara District Mutual Ins. Co.*, 16 Gr. 198. Quoting the 27th sec. of the Consol. Stat. U. C. ch. 52, his Lordship remarked, "This provision of the statute is indeed only in affirmance of what I take to be the law without it. The existence of an incumbrance upon the assured premises is a material fact and an applicant for insurance is bound to state to the assurers all material facts; and he is not excused by his ignorance that material facts undisclosed are really material;" which propositions he supports by reference to the cases of *Lindeneau v. Desborough*, 8 B. & C. 586, and *Jones v. Provincial*, 3 C. B. N. S. 65, and cites also the case of *Bates v. Hewitt*, L. R. 2 Q. B. 595. In the last mentioned case, the information withheld was shewn to be material, as it was the very fact which occasioned the loss, viz: that the vessel on which the risk was offered was the Confederate States cruiser Georgia, whose career had rendered her liable to the seizure by a frigate of the U. S., which was the loss in question. The evidence in *Bleakley's Case* is not given in the report; and therefore it does not appear on what facts the materiality of the information

as to incumbrances may have rested; nor does it appear that the case in any way turned on that question. The policy seems to have been avoided under the clear terms of sec. 27 of the statute.

Doubtless an underwriter may make the question of encumbrances material to the validity of the policy by expressly requiring a true statement on the subject as a condition of his liability, and in practice this may usually be done; but I cannot assent to the doctrine that the existence of an encumbrance can, as a proposition of law, be pronounced a material fact; with the necessary consequence that the omission to disclose it will, apart from stipulation, irrespective of its nature or amount, and without any imputation of fraudulent concealment, enable the underwriter to repudiate his liability. I have already quoted the language used by the learned Chancellor in refusing the amendment in *Bleakley's Case*, (ante p. 563). The expressions there used seem to qualify the language of the passage I have just now referred to, and to show that the materiality of the mention of encumbrances was not intended to be asserted as a proposition of law but as a question of fact.

I think the second plea also fails as a defence.

There is a clause in the policy to which I allude, principally in order to say that I have not overlooked it. It is, that "if the assured is not the sole and unconditional owner of the property insured, unless the true title be expressed therein, then and in every such case the policy shall be void." This is a retention in the modern policy of a provision of the statute, which, with the reason for the provision itself, has now passed away. Whether it ought to be held that the clause can be operative under the present law, or, if operative should receive any different construction from that which I have given to sec. 36, and be read and supported as imposing an arbitrary requirement in addition to what the law requires, are matters that do not arise now for consideration, because no question is raised upon the record under the clause.

The appeal should be allowed, and the rule made abso-

lute to enter a verdict for the plaintiff for two thousand dollars, being the insurance on his goods, with interest at six per cent. per annum from the end of three months after the proofs of loss were furnished.

HARRISON, C. J.—With all possible desire to assist the plaintiffs, I am unable, consistently with the authorities as I understand them, and with the reasoning on which they proceed, as I understand it, to concur in reversing the decision of the Court of Common Pleas.

We are all of opinion, as there is no question of waiver or estoppel in this case, that the plaintiffs cannot be allowed to claim the benefit of a contract obtained for them by an agent, and at the same time insist that they are not responsible for untrue statements made by the agent: see *Bristow v. Whitmore*, 9 H. L. C. 391; *Armstrong v. Stewart*, 25 C. P. 198; *Draper v. The Charter Oak Fire Ins. Co.*, 2 Allen 569; *Smith v. Empire Ins. Co.*, 25 Barb. 497.

This being so, we all think recovery by the plaintiffs in respect of the building is impossible, because of the misrepresentation as to encumbrances on the land; but it is argued that notwithstanding, there should be a recovery under the policy in respect of the lumber, materials, &c., covered by the policy; and this is the point as to which a difference of opinion exists.

We must be careful not to suffer the supposed principle of abstract justice involved in this argument to carry us away from the simple duty of construing the contract sued upon as we would any other contract not affected by considerations of hardship or supposed injustice. It is certainly not quite agreeable to our ideas of abstract justice to be obliged to admit that an answer in regard to encumbrances on the real estate should have the effect of depriving the insured of compensation for that about which there was no untruth; but the question is solely as to what the statute says, and what the contract under the statute says, upon the point. See per Thompson, C. J., in *Gottsmann v. Pennsylvania Ins. Co.*, 56 Penn. 210.



If the construction of the statute and of the policy be on the authorities reasonably clear, whatever that construction be, we must give effect to it regardless of considerations of hardship. The statute, as it stood at the time that the insurance was effected, declared that misrepresentation or concealment such as therein alleged "shall render *the policy* void, and *no claim* for loss shall be recoverable *thereunder*, unless the board of directors shall see fit in their discretion to waive the defect:" sec. 36 of 36 Vic. ch. 44, Ont. The statute did not in words declare that if there be a misrepresentation or concealment as to part of the property insured, the policy shall only be void as to that part and good as to the remainder of the property insured. See *Daniel v. Robinson*, Batty 650, 653.

But the contention on the part of the plaintiffs is, that having a proper regard to the subject matter of the contract, this was the effect of the language used.

Where there is only one contract for our consideration, and the statute declares that under certain circumstances such contract shall be void, my difficulty is to decide, without interfering with the functions of the Legislature, that the policy shall under the circumstances be only *partially* void—in other words, divisible.

I fully admit that in construing such a contract we should look not only at the language used, but also to the subject matter of the contract, but so looking I cannot see my way to the conclusion that the contract is divisible. In the event of the building taking fire, the personal property *therein* contained would be endangered. The owners, therefore, in providing against danger from fire to the building, must be held as providing against danger to the contents of the building. The *risk* is in truth but one. In the event of the risk becoming a loss, the *liability* as to each class of property insured is limited as to amount. The insurers, in consideration of the receipt of one hundred and ninety-five dollars, assumed this risk. It appears, according to the application for the insurance, if referred to as part of the policy, that the rate of insurance was the

same for the realty as the personalty. But whether this be so or not, the consideration expressed on the face of the policy is single and entire. It will not be denied that persons having separate dealings with each other may afterwards reduce their rights and liabilities to writing, and make the writing one entire contract, good altogether or bad altogether, according to particular circumstances provided against. See *Baldey v. Parker*, 2 B. & C. 37; *Elliott v. Thomas*, 3 M. & W. 170; *Bigg v. Whisking*, 14 C. B. 195; *Lee v. The Howard Fire Ins. Co.*, 11 Cush. 324.

It appears to me that this is what the parties to this contract of insurance, whether they meant to do so or not, have under the operation of the statute actually done. If the consideration paid, or to be paid, by one party to another, for the performance of a certain promise or promises, be single and entire, the contract is held entire although the subject matter of the contract consists of several distinct and wholly independent items: 2 *Parsons on Contracts*, 519.

So far I have discussed the question now before us without any reference to decisions bearing on the point in this Province. These will be found, when closely examined, not only uniform in principle, but utterly opposed to the idea that the policy in this case should be read as divisible. In *Ramsay Woollen Cloth Co. v. Johnstown Mutual*, 11 U. C. R. 516, 521; Robinson, C. J., Draper, J., concurring, said: "I think, upon legal principles and in reason, the breach of this condition, when it occurs, avoids the whole policy." In *Bleakley v. Niagara District Mutual Fire Ins. Co.*, 16 Gr. 198, 204, the present Chancellor said: "There is only one contract of insurance, and the effect of insuring separate buildings for separate sums is *only* to limit the liability of the assurers as to each." In *Date v. Gore District Mutual Fire Ins. Co.*, 14 C. P. 548, 554, Wilson, J., said, referring to the *Ramsay Woollen Cloth Company's Case*: "In this case the two kinds of insurance have no kind of connection with each other, and therefore the decision does not prevent us from construing

the statute, as it appears to me it ought to be in this case, against the company." See further Per Wilson, J., in *Kuntz v. Niagara District Ins. Co.*, 16 C. P. 573, 579. It is clear to me that the effect of our dismissing this appeal, where the insurance is on the building and contents thereof, will not be in any manner to overrule or interfere with *Date v. Gore District Mutual Fire Ins. Co.*, 14 C. P. 548. In *Russ v. Mutual Fire Ins. Co. of Clinton*, 29 U. C. R. 73, 79, in which the previous cases were cited, the present Chief Justice of Canada said: "It seems to me the policy must be void, not only as to the buildings, but on furniture."

While admitting that these authorities are not binding on us in this Court, I cannot divest my mind of the thought that the combined opinions of such eminent and experienced jurists as the late Sir John B. Robinson, the present Chief Justice of this Court, now unhappily absent from illness, the present Chancellor of this Province, and the present Chief Justice of the Supreme Court of the Dominion, are entitled to very great respect in the consideration and determination of a question of insurance law, in this or any other Court in this Province.

Besides, when I turn from the decisions in this Province to decisions of the United States of America, where questions of insurance law are being daily decided under policies similar to the one before us, notwithstanding the multiplicity of courts, and consequent contrariety of decision in that country, the weight of authority is decidedly in favour of the view which I hold and have ventured to express. In *Friesmuth v. Agawan Mutual Ins. Co.*, 10 Cush. 589, 590, Bigelow, J., said: "The argument for divisibility of the policy proceeds upon a mistaken view of the nature of the contract and the respective rights and liabilities of the parties. The contract of insurance on the part of the defendants was not distinct and separate on each class or subject embraced in the policy. It was separate and distinct only so far as to limit the extent of the risk assumed by the defendants on each kind of property. In

all other respects it was an entire contract." This decision has been followed in Massachusetts, in *Brown v. People's Mutual Ins Co.*, 11 Cush. 280; *Lee v. Howard*, 3 Gray, 583; and *Kimball v. Howard*, 8 Gray, 33. Such also is the law of the State of Maine: *Battles v. York County Mutual Fire Ins. Co.*, 41 Me. 208; *Lovejoy v. Augusta Mutual Fire Ins. Co.*, 45 Me. 472; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Barnes v. Union Mutual*, 51 Me. 110; of New Hampshire: *Patten v. Merchants' and Farmers' Mutual Fire Ins. Co.*, 38 N. H. 338; of New York: *Wilson v. The Herkimer County Ins. Co.*, 2 Seld. 53; *Smith v. Empire, Ins. Co.*, 25 Barb. 497; of Pennsylvania: *Trustees v. Williamson*, 26 Penn. 196; *Gottzman v. Pennsylvania Ins. Co.*, 56 Penn. 210. And of Maryland: *Associated Fireman's Ins. Co. v. Assum*, 5 Md. 165; *Bowman v. Franklin Fire Ins. Co.*, 40 Md 620, The latest case which I have seen is *Hinman v. Hartford*, 36 Wis. 159, 169, where the Court says: "The contract of insurance is entire, and failing in part, it fails wholly. *This is well settled.*" The law on the point is now indeed considered so well settled in the United States that in most of the recent cases it is so stated without debate or doubt.

It is not necessary, therefore, to multiply the United States authorities against the divisibility of the contract, but it is only right that I should make some reference to the decisions to the contrary. The first is *Trench v. The Chenango Mutual Ins. Co.*, 7 Hill 122. This case was first shaken by the Court of Appeal in *Wilson v. Herkimer Co. Ins. Co.*, 2 Seld. 53, and afterwards overruled in *Smith v. Empire*, 25 Barb. 497; 504; and was treated as overruled both in *Friesmuth v. Agawam*, 10 Cush. 587, and in *Brown v. People's*, 11 Cush. 280. The second is *Clark v. New England Fire Ins. Co.*, 6 Cush. 342. This case is disregarded in *Friesmuth v. Agawam*, 10 Cush. 587, and *Brown v. People's*, 11 Cush. 280. In *May on Insurance*, 303, it is said not now to be the law of Massachusetts, though it does not appear to have been overruled or even referred to in the subsequent cases. The third is *Loehner v. The Home Mutual*



*Fire Ins. Co.*, 17 Mo. 247, affirmed 19 Mo. 628, 3 Bennet 445, in which the fact concealed was the user of the house insured as a bawdy house. It was held that the policy was divisible as to land and goods. This case was apparently followed in *Konelly v. Hannibal Ins. Co.*, 42 Mo. 126; *Phoenix v. Lawrence*, 4 Met. Ky. 9; s. c. 4 Bennett, 628, 632. The fourth is *Burrill v. Chenango*, 1 Edm. Sel. Cas. New York, 233, of which there is no report in our library, but it is plainly opposed to many cases in the State of New York, to which I have already referred. The fifth is *Rowley v. The Empire*, 42 N. Y. 557, to which the foregoing remarks apply. There may be others, but if so I have, notwithstanding diligent search, been unable to obtain any reference to them.

It must be admitted that the weight of authority in the United States establishes that where property, real and personal, although separately described and separately valued in the same policy, are in fact so connected as to form but one risk, anything which avoids the liability for the risk avoids liability for whole risk.

In *Lee v. Howard*, 3 Gray 583, 594; *S. C.* 3 Bennett 733, 740, the law on the point was expressed as follows: "The policy cannot be held valid for a portion of the risk, and invalid as to the residue. It was an entire contract entered into for an entire consideration. The property was insured as one risk, and was in fact closely connected together. It is impossible to say that either portion of the risk would have been taken without the other."

This in most of the cases is held to be the law as a mere question of interpretation of the contract, and without reference to the fact whether the insurance company is a mutual company or not, and has or has not a lien on the real estate for the amount of the premium. See *Fireman's Ins. Co. v. Assum*, 5 Md. 165; *Davenport v. New England Mutual Ins. Co.*, 6 Cush. 340; *Packard v. Agawam Mutual Fire Ins. Co.*, 2 Gray 334; *Richardson v. Maine*, 46 Me. 394, 398.

And this is the conclusion at which, upon reading our statute and the policy, I would have arrived in the absence of any authority ; but, fortified as it is by the opinions of so many learned jurists both in this country and in the United States, I make bold to express it, although opposed to the opinions of my brother Judges in this Court.

In my opinion the appeal should be dismissed.

BURTON and MOSS, JJ. A., concurred with PATTERSON, J. A.

*Appeal allowed (a).*

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(a) This case has been carried to the Supreme Court, and stands for argument.

## WALKER ET AL. V. WALTON ET AL.

*Mechanics' Lien Acts of 1873 and 1874.*

The plaintiffs registered a lien under the "Mechanics' Lien Act of 1873" on the 14th of August, 1874, for the price of machinery furnished on or on the 12th of the same month. The price was payable in instalments, the last of which fell due on the 4th of May, 1875. A bill to enforce the lien was filed on the 7th of July, 1875, being within the 90 days "from the expiry of the period of credit" prescribed by section 4 of the "Mechanics' Lien Act of 1873."

The 14th section of the "Mechanics' Lien Act of 1874," which came into force on the 21st of December, 1875, enacted that "Every lien shall absolutely cease to exist at the expiration of 30 days after the work shall have been completed, or the machinery furnished, unless in the meantime proceedings shall have been taken to realize the claim under this Act"; and section 20 repealed all Acts inconsistent therewith.

*Held*, PRUDFOOT, V. C., dissenting, reversing the decree of BLAKE, V. C., 24 Gr. 209, that even if the Act of 1874 repealed the Act of 1873, the plaintiffs' lien was saved by sub-section 34 of section 7 of the Interpretation Act, which provides that the "repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued, or established \* \* before the time when such repeal shall take effect.

THIS was an appeal from the decision of Vice Chancellor Blake, allowing a demurrer to the bill, reported in 24 Gr. 209. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The appellants' reasons of appeal were:—

1. The "Mechanics' Lien Act of 1874" came into force on the 21st December, 1874. The lien of the appellants was acquired by registration, under the Lien Act of 1873, on the 14th August, 1874, and was a valid and subsisting lien when the Act of 1874 came into force; therefore, even if sec. 14 of the Act of 1874 had the effect of repealing sec. 4 of the Act of 1873, it could not affect the lien in question: Interpretation Act, Ontario Statutes, 31 Vic. ch. 1, sec. 7, sub-sec. 34.

2. Sec. 4 of the Act of 1873 is not inconsistent with sec. 14 of the Act of 1874, and is, therefore, not repealed thereby. Under the Act of 1873 a lien is not acquired until registration is made and notice is thus given to all parties interested. Under sec. 2 of the Act of 1874 a lien is acquired

simply by virtue of being employed or furnishing materials. The lien under the Act of 1874 being thus acquired without registration or notice, sec. 14 provides that such a lien is to cease after the expiration of thirty days, unless proceedings in the meantime be instituted to realize the lien. Under the Act of 1873, under which registration is required in the first instance, a longer period is allowed within which to institute legal proceedings, and, under that Act, ninety days after the expiry of the period of credit is given. This suit was instituted before ninety days had elapsed.

3. If the same words occur in different parts of a statute they must be taken to have been everywhere used in the same sense—*Dwarris*, p. 574. The word “lien,” in sec. 14 of the Act of 1874, has the same meaning as the word “lien” under sec. 2 of the same Act, and, therefore, refers only to a lien created under the Act of 1874. As sec. 14 can be so construed, it is submitted that the Court will place this construction upon it.

4. To place the construction on the Act in question contended for by the respondents, would be to declare that it was the intention of the Legislature to destroy vested rights, created upon the faith of an Act passed in the preceding year, and without giving any compensation. It will not be presumed that the Legislature so intended. This presumption is strengthened by the fact that the Act of 1874 came into effect at once, and without any time being given to lien holders within which to save their liens. The Court will give a statute an *ex post facto* operation only when the words coerce the Court to do so: *Dwarris*, p. 541. See also *Maxwell* on Statutes, pp. 66, 192; *Moon v. Durden*, 2 Ex. 22; *Moore v. Phillipps*, 7 M. & W. 536; *Jackson v. Woolley*, 8 E. & B. 784; *Williams v. Smith*, 4 H. & N. 559; *Gillmore v. Shooter*, 2 Mod. 310; *Ashburnham v. Bradshaw*, 2 Atk. 36.

The following were the respondents' reasons against the appeal:—

2. The provisions of the Mechanics' Lien Act of 1874 are, by the terms of the Act, incorporated with the Mechanics'



Lien Act of 1873, and by the 20th section of the Act of 1874 all provisions of the Act of 1873, inconsistent with those of the Act of 1874, are repealed. The 4th section of the Act of 1873 allowed ninety days after the work shall have been completed, or materials or machinery furnished, or the lapsing of the period of credit within which proceedings should be taken to realize the lien. The 14th section of the Act of 1874 expressly states that "Every lien shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed, or materials or machinery furnished, unless, in the meantime, proceedings shall have been instituted to realize the claim under the provisions of this Act, and a certificate thereof is duly registered in the registry office of the city, county, or riding wherein the lands, in respect of which the lien is claimed, are situate"; and this provision being clearly inconsistent with that contained in the 4th section of the Act of 1873, the said 4th section is, by the 20th section of the Act of 1874, repealed, and the 14th section of the Act of 1874 alone regulates the time within which proceedings must be taken, namely, thirty days after the work shall have been completed, or materials or machinery provided; and proceedings in this case not having been taken within that time, the lien in question herein had ceased to exist, and the demurrer to the bill of complaint herein was rightly allowed.

2. The distinction between the Act of 1873 and 1874 as to the acquiring of the lien, set out in the appellants' second reason of appeal, does not exist. Under the Act of 1874 the lien does not exist until the statement required by sec. 2 of the Act of 1873 is filed.

3. The Acts of 1873 and 1874 must be read together, and the word "lien," in the 14th section of the Act of 1874, refers to the lien created by both Acts.

4. The words "shall have been completed," in the 14th section of the Act of 1874, seem to point to liens for work done, and liens existing anterior to the passing of that Act.

5. Even if the effect of the decision appealed from is to disturb vested rights, the Legislature, by their unqualified

repeal of all provisions inconsistent with those of the Act of 1874, have left to the Courts no discretion in giving *ex post facto* operation to the statute.

6. The respondents further say that the decision of the learned Vice-Chancellor should be sustained for the reasons given in his judgment, delivered herein.

The case was argued on the 20th March, 1877 (*a*).

*J. H. McDonald*, for the appellant.

*A. F. Campbell*, for the respondents.

The arguments and cases cited, fully appear in the reasons for and against the appeal.

June 27th, 1877 (*b*). BURTON, J. A.—This case appears to have been argued before the learned Vice Chancellor upon the sole question of whether section 4 of the Act of 1873 is so clearly inconsistent with section 14 of the more recent enactment, as to bring it within the operation of the repealing section of that Act. His attention does not appear to have been drawn to the 7th section of the Interpretation Act, which provides in general terms that the repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued, or established, or any proceedings commenced in a civil cause, before the time when such repeal shall take effect.

The bill in this cause was filed on the 7th July, 1875, for the purpose of enforcing a lien which the plaintiffs claimed upon certain leasehold premises, in which the defendants professed to have an interest, for machinery furnished to one of the defendants, and put up upon those premises. The machinery was furnished upon his credit and was to be paid for by instalments maturing within nine months. A claim in the statutory form was duly filed on the 14th August, 1874, two days after the machinery

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(*a*) *Present*.—BURTON, PATTERSON, MOSS, JJ. A., and PROUDFOOT, V. C.

(*b*) *Present*.—BURTON, PATTERSON, MOSS, JJ. A., and PROUDFOOT, V. C.

was supplied, and the bill was filed within ninety days from the expiry of the credit. The other defendant was a subsequent purchaser of the premises.

The plaintiffs, therefore, had done everything which the statute required to make their claim valid, and in reliance upon the Act had instituted proceedings to realize their claim. It is difficult to believe that the Legislature intended that parties in the position of these plaintiffs, who had a valid claim under the existing law, and who had commenced a suit and incurred the cost of such proceedings, should not only be deprived of them, but rendered liable to pay the costs of their opponents, as they would be by being obliged to dismiss their bill. The framer of the bill no doubt had the general provisions of the Interpretation Act in his mind when penning the 20th section, which, taken literally, would sweep away all such claims and the suits founded upon them. It appears therefore to me, that, even adopting the view that these clauses are inconsistent, the learned Vice Chancellor would have overruled the demurrer, had the section of the Interpretation Act been present to his mind, or if his attention had been drawn to it.

I do not agree in the argument that was pressed upon us at the bar, that the word lien, in the 14th section of the Act of 1874, points to liens for work done, and liens existing anterior to the passing of the Act. Those words are manifestly prospective, and apply to the lien created by that Act, the intention of the Legislature being, by the later enactment, to provide that a mechanic, by virtue of his being employed, or furnishing materials for any building, shall have a lien or charge without any preliminary registration, provided only he institutes proceedings and registers a certificate of such proceedings within thirty days.

Whether the benefits which the promoters of these bills had in view for the class interested have been realized, I am not aware, but it is clear that they have not been obtained without great injustice to other, and perfectly innocent parties.

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A case recently came under my notice where a proprietor who had recently put up a building, and had paid his contractor as his payments fell due, on endeavouring to deal with his property, found no less than thirty-two claims registered against it by parties who had been employed by the contractor.

It is true that none of those claims could be enforced against him, but it prevented his dealing with the property without going to the expense of getting all these registrations removed.

I think that this appeal should be allowed, with costs.

PATTERSON, J. A.—I do not think it necessary for the purpose of this appeal to express any opinion whether the Act of 1873 is so inconsistent with that of 1874 as to be repealed by the general clause in the latter Act which declares that all acts inconsistent with its provisions are repealed; and I abstain from expressing any such opinion because the revised statutes authorized by Parliament will, when issued, fix the authoritative reading of the law.

For the purpose of this case, I may assume that the earlier Act is repealed, and that the later one stands alone. Making that assumption for the sake of argument, I am of opinion that the plaintiffs' lien is saved by the Interpretation Act.

The bill shews that the plaintiffs' lien was effected on the 14th August, 1874, by registration under the Act of 1873, for the price of machinery furnished on the 12th of the same month. The whole price was \$925, payable by instalments, the last of which, viz., \$325, fell due on the 4th May, 1875. The bill was filed on the 7th July, 1875.

There was thus an existing lien for an ascertained debt when the Act of 1874 was passed, which was on the 21st December, 1874. Under the Act of 1873 the time for proceeding to enforce the lien was any time within three months from the 4th May, 1875, when the credit expired. Under the Act of 1874 it was thirty days from the 12th August, 1873, when the machinery was furnished. The Act destroyed the lien altogether, if applicable to it.



The 34th sub-sec. of sec. 7 of the Interpretation Act provides that "The repeal of an Act at any time shall not affect any act done or any right or right of action existing, accruing, accrued, or established, or any proceedings commenced in a civil cause, before the time when such repeal shall take effect ; but the proceedings in such case shall be conformable when necessary to the repealing Act."

Here there was clearly a right accrued and established under the old Act before the time when the repeal took effect.

I do not see anything to qualify the effect of sub-sec. 34 in preserving that right.

Sub-secs. 33 and 35 are carefully drawn to guard against difficulty, even in matters of procedure to enforce existing rights, when the procedure depends on the provisions of the repealed or repealing statutes ; requiring the new provisions to be resorted to when applicable, but preserving the right to use the old procedure if the new law be inconsistent with the old in that respect, or if the new provisions cannot be adapted to the old law.

The only provision which seems to me capable of being read as affecting the plaintiffs' claim is, that of sec. 14 of the Act of 1874, that "*Every lien* shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed, or materials or machinery furnished." So to construe that section would, however, not only be contrary to the well established rule that a statute shall not be so construed as to operate retrospectively, or to take away a vested right, unless it contain either an enumeration of the cases in which it is to have such an operation, or words which can have no meaning unless such a construction is adopted ; but it would be to overlook language in the section itself, as well as some other considerations which shew that that is not its proper reading.

Upon the hypothesis that the old Act is repealed by this one, there is no sound reason for holding that this Act is intended to touch liens created by the other. Reading the

act apart from our knowledge of the former one, we find nothing to suggest the existence of any other. It is complete in itself, and deals with the liens created under its own provisions, ignoring all others. If it should be read as an amendment of the former, and as incorporated with it, doubtless the words *every lien* would be comprehensive enough to embrace existing as well as future ones, yet in that case we should find, under the rule I have quoted, that the section would be so far satisfied by application to newly created liens, as not to violate the maxim *nova constitutio futuris formam imponere debet, non præteritis*.

Indeed its words can scarcely be read as applicable to the lien of this plaintiff, without applying a degree of gentle violence to their grammatical effect.

The words are "Every lien *shall absolutely cease* after the expiration of thirty days after the work shall have been completed or materials or machinery furnished."

Now, having regard to the dates, the furnishing of the machinery in August, the expiry of the thirty days in September, and the passing of the Act in December, the literal reading of the clause makes it declare in December that this lien *shall cease last September*. To read it as saying that the lien shall *be deemed to have ceased* on a past day is a liberty which might be permissible in order to carry out the clear intention of a remedial Act, or to avoid an obvious injustice, but not to work a forfeiture of a vested right. The structure of the clause itself thus points its application to the future, and excludes the lien of the plaintiff.

I think the appeal should be allowed with costs, and the demurrer overruled with costs.

Moss, J. A.—I also am of opinion that a reference to the Interpretation Act is sufficient for the disposition of this appeal. If the correctness of the view of the learned Vice-Chancellor, that the Act of 1874 was in substitution and therefore by way of repeal of the Act of 1873, be conceded,

the plaintiffs' case seems to be precisely covered by the 34th sub-sec. of sec. 7 of the Interpretation Act. The effect of that sub-sec. is to declare that such repeal of the Act of 1873 shall not effect any act done or any right or right of action existing, accruing, accrued, or established before the repeal.

The plaintiffs duly registered their certificate on the 14th August, 1874, before the enactment of the repealing statute.

By the terms of their agreement with the purchaser the machinery in respect of which the lien is claimed was sold upon credit, which did not expire until the 4th of May, 1875.

Upon the filing of the certificate, the plaintiffs became entitled to a lien upon the land in question, which lien was to cease to exist within ninety days from the expiry of the period of credit, unless proceedings were instituted in the meantime. It seems to me that plaintiffs had, on the 21st of December, 1874, when the second Act became law, a right, namely, their lien upon the defendant's interest in the property, and a right of action, either accruing or accrued, namely, that of realizing the amount due to them out of such interest.

Nothing less than an express declaration of the Legislature, or at least language which excluded any other interpretation, should be held to destroy such a vested right. It is not sufficient to point to provisions in the new Act which are inconsistent with those of the prior enactment. Whenever an Act is repealed and a new one substituted for it, there will be inconsistencies between the different provisions.

Giving the fullest effect to the limitation in the 6th section of the Interpretation Act, it must be shewn that in the Act of 1874 it is "*otherwise provided*," which means that you must find that it is provided that the repeal of the Act of 1873 *shall* affect a right or a right of action accruing or accrued; or it must be shewn that there is "something in the context, or other provisions thereof, indicating a different meaning, or calling for a different

construction," which means that you must find something which indicates, and, as I take it, plainly indicates, that the salutary rule that the repeal shall be without prejudice to existing rights is inapplicable. In my judgment the attempt to shew the one thing or the other has entirely failed.

Clearly there is no express declaration that the 7th section is not to apply. Equally clear is it, I think, that nothing in the Act calls for a construction so harsh and inequitable.

The single passage on which reliance is placed, is the 14th section, which enacts that *every* lien shall absolutely cease to exist after the expiration of thirty days from the furnishing of the machinery, unless in the meantime proceedings for realization shall have been instituted. But surely full significance is given to this section by construing "every lien" to mean "every lien conferred by or arising under the Act." Some restriction must manifestly be placed upon the extreme generality of the words, and it seems to me that the duty of the Court is to construe them so as to avoid injustice. Again, the language is not applicable to the plaintiffs' lien. The enactment is, that "every lien *shall absolutely cease* to exist," unless within thirty days from the furnishing of the machinery proceedings are instituted. How can this lien be said to have *ceased* to exist by reason of default, when the time for taking the step required for its continuance had passed long before the enactment? The words seem to extend with propriety only to liens which should come into existence under the provisions of the Act.

I am, therefore, of opinion that on this ground the appeal should be allowed.

In this view of the case it is unnecessary to express any opinion upon the question whether the Act of 1874 does in fact repeal the Act of 1873. As it is unnecessary, I think it better to abstain from pronouncing an opinion in the present case. The learned counsel for the plaintiff and the defendant seemed to agree that the latter Act did not



absolutely repeal the former. The learned counsel for the defendant, who addressed a very careful argument to us, no doubt advanced this view because he was pressed with the difficulty which an admission of the repeal might create by enabling the plaintiffs to claim the benefit of the Interpretation Act. His contention was that the Acts must be read together, and that the word "lien" in the 14th section of the Act of 1874 refers to the lien created by both Acts. Before expressing a positive opinion upon a question of so much nicety, I should have desired to hear both views fully argued.

PROUDFOOT, V. C.—Having the misfortune to differ from the other members of the Court, I venture to express my opinion with much diffidence and distrust of its accuracy.

The Act of 1873 gave a lien for labour and materials, upon the registry of the claim in the proper registry office, which was to cease to exist within ninety days after the completion of the work, or furnishing materials, *or the expiry of the period of credit*, unless in the meantime proceedings should have been instituted to realize the lien. It then proceeded to enact in what Courts the lien was to be enforced, the power of the Judge to direct a sale of machinery, that the subject of the lien was not to be removed, that security might be accepted, provided for the cases of subcontractors, and for distribution among several lien holders.

On all of these matters, the Act of 1874 has clauses modifying, altering, or superseding the provisions of the Act of 1873; the giving of the lien, and the mode of enforcing it, is a complete whole, and needs no aid from the earlier Act to give it effect. And what to my mind is very cogent evidence to shew that the Act of 1874 was intended to be the only one in use after it came into operation, is, that a number of the clauses of the Act of 1873 are reproduced verbatim. If the former Act was to continue in force and simply to be amended, there would be no meaning in re-enacting those clauses. All that was necessary was to have declared the existence of the lien created by the

later Act, and then these provisions would have applied to it without repeating them.

Besides, the later Act does not profess to be an amending Act; there is not a word in it expressly referring to the earlier Act. In the title alone is the statement found that it amends the Act of 1873. But the title is no part of the Act, it is merely a mode by which the statute may be found: *Attorney-General v. Weymouth*, Amb. 20, 22. An amendment, however, may consist in an entire substitution. An amendment of an Act relating to mechanics' liens may well enough consist in the creation of a new or different lien, subject to new or different conditions. So that, were we to assume the title to be part of the Act, it would not necessarily follow that the same lien should continue, or that the mode of enforcing it should be similar.

Again, the Act of 1873, after giving the right to a lien, enacted (sec. 4) that *such* lien shall cease, &c. The Act of 1874 (sec. 14) says that *every* lien, *i. e.* for work and materials, shall cease, &c. This variation of phrase seems to me to indicate that in the latter case the intention of the Legislature was to apply the 14th section not only to the liens under that Act, but also those that might have had an existence under the former Act.

I conclude therefore that the Act of 1874 was a substitute for that of 1873. And while the later Act gives a lien from the performance of work and furnishing of materials, independent of contract, it was not intended to interfere with the liberty of the parties to contract in any way they pleased, either for an express lien, outside of the statute, or for none at all. And if they chose to modify the lien given by the statute, by giving credit, it might well be assumed they would take care to have an express charge or security to protect it.

The question then is reduced to the effect of the repealing clauses, in connection with the Interpretation Act.

The Act of 1874 (sec. 14) enacts that every lien shall cease after thirty days from the completion of the work, &c., unless in the meantime proceedings be instituted to realize

it. And (by sec. 20) all Acts inconsistent with the provisions of that Act are repealed. The Interpretation Act sec. 7, sub-sec. 33, enacts that "Where any Act is repealed, wholly or in part, and other provisions substituted, all \* \* proceedings taken under the old law shall be taken up and continued under the new law, *when not inconsistent therewith.*" And sub-sec. 34 enacts that the repeal of an Act shall not affect any act done or any right of action existing before the repeal takes effect. But all the sub-sections of sec. 7 are subject to the limitations in sec. 6, which provides that in construing any Act "unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning, or calling for a different construction," certain rules are to apply. All the sub-sections of sec. 7 are, therefore, subject to this qualification.

Are the provisions of the Act of 1874 then inconsistent with those of 1873, or is it otherwise provided in the Act of 1874, or does the context, or do the other provisions of the Act of 1874 conflict with those of 1873? The former Act gives a lien by registration, the latter without registration. The former says that the lien shall cease within ninety days after the completion of the work, *or expiration of the credit*, unless proceedings be taken, &c.; the latter that every lien shall cease after the expiration of thirty days from the completion of the work, &c. unless proceedings be taken in the meantime to enforce it. It makes no saving in respect of credit, does not recognise any lien where credit is given, unless perhaps a credit of less than 30 days from completion of work. These provisions seem to me to be plainly inconsistent. The two cannot stand together. To say that a lien shall exist for ninety days, or it may be for ninety years, can by no reasonable rule of interpretation be held to be consistent with an enactment that it shall cease after thirty days. I think, therefore, that these rights of liens are otherwise provided for, that the enactments of the later Act do conflict with those of the former, and that the Interpretation Act does not aid the plaintiff.

I am quite aware that this construction is open to the objection that it gives an *ex post facto* operation to the Act.

There is no doubt that, as a general rule, statutes are not to be taken to apply to a past, but to a future state of circumstances. There is equally little doubt that the Legislature has the power of passing an Act to apply to past circumstances; and the rule will therefore yield to the intention of the Legislature: *McEvoy v. Clune*, 21 Gr. 515. As in my opinion the Legislature has plainly enough indicated its intention that the rights given by the Act of 1873 should cease when the Act of 1874 came into operation, there is nothing left for the Court to do but to give effect to it.

It was mentioned during the argument, as some guide to the interpretation of these statutes, that in the recent revision of the Statutes of Ontario the provisions of both are consolidated together. It may be a sufficient answer to say that this revision is not now, and may never be, in force, and that the construction of these Acts by the commissioners of revision is not binding in this Court. But in my opinion the commissioners have on this subject gone far beyond a mere consolidation of the existing law. They have framed a new law compounded out of the two statutes, reviving rights that were extinguished, and attaching forms to existing rights to which they were not before subject. Thus no notice is taken of sec. 20 of the Act of 1874, repealing inconsistent enactments, nor is any effect given to it. An option is given to register every lien. If not registered it ceases in thirty days, if registered the lien subsists for ninety days after completion of work or expiration of credit. This may be a very wise and proper enactment, but it is not, in my opinion, a statement of the law as it exists—it is legislating, not interpreting.

I think the appeal should be dismissed.

*Appeal allowed.*

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## BALL V. PARKER.

*Statute of Limitations—Part payment.*

The plaintiff, an attorney, had an account for costs against the defendant, a merchant, for services rendered before 1870, and which was therefore barred by statute. It appeared that in 1872 the plaintiff bought certain goods from the defendant, without any agreement at the time as to how they were to be paid for, but after the defendant had rendered his account for them, the plaintiff told him or his clerk that he had credited it against his, the plaintiff's, account, and no subsequent demand was made upon him for payment. In 1875 the plaintiff sent the defendant his account, and stated that he had credited defendant's account rendered. The defendant's clerk answered, repudiating the claim, and added "Trusting that you may be able to make your account out of the parties against whom you got judgment in the case, as well as the advances made by me in cash, and the *supplies charged to you since in my books.*"

*Held*, affirming the judgment of the Queen's Bench, 39 U. C. R. 488, BURTON, J. A., dissenting, that upon the above facts, and upon the evidence more fully stated below, there was no evidence of the defendant's assent to the application of the price of the goods as a payment on the plaintiff's account, sufficient to take the case out of the statute.

THIS was an appeal from a judgment of the Court of Queen's Bench, making absolute a rule to enter a nonsuit, reported 39 U. C. R. 488. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The appellant's reasons of appeal were:—

1. A payment sufficient to take the case out of the Statute of Limitations was proved by the application of the account of \$24.55 in 1872 against the plaintiff's claim: *Hooper v. Stephens*, 4 A. & E. 71; *Walker v. Butler*, 6 E. & B. 506; *Bodger v. Arch*, 10 Ex. 333-41; *Amos v. Smith*, 1 H. & C. 238; *Hart v. Nash*, 2 C. M. & R. 337; *Maber v. Maber*, L. R. 2 Ex. 153; *Cottam v. Partridge*, 4 Sc. N. R. 819-34; *Blair v. Ormond*, 17 Q. B. 423; *Cleave v. Jones*, 6 Ex. 573.

2. The assent of the defendant to such appropriation is shewn by the letter of the 4th August, 1875, taken in connection with that of the plaintiff of the 22nd May, 1875. It is further shewn by the fact of the defendant abstaining to collect the said account until it is also barred by the Statute, a course of dealing on the part of the defendant

consistent only with the appropriation of the same in accordance with the plaintiff's contention. It is further shown by the plaintiff's vivâ voce testimony of such appropriation and by the other testimony given at the trial *Baildon v. Walton*, 1 Ex. 617; *Taylor on Evidence*, vol. i., 5th ed. 617; *Collinson v. Margesson*, 27 L. J. Ex. 305; *Gaskill v. Skene*, 14 Q. B. 664; *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. 307.

3. Such letter is evidence against the defendant because it was written by an agent having authority to make it, and at all events it appears the defendant afterwards under oath recognized such authority.

4. If not sufficient as an acknowledgment under the statute, it is at all events evidence bearing on the fact of payment within six years.

5. The fact that in the letter of the 4th August, 1875, the defendant repudiates liability does not the less make it evidence of what was done by the defendant in 1872, when the alleged payment was made: *Wainman v. Kynman*, 1 Ex. 118; *Baildon v. Walton*, 1 Ex. 617.

6. That the last paragraph of the letter of the 4th August, 1875, plainly shews that the defendant claimed, among other things, to be interested in the judgment against the Hatchs' for costs to the extent of the \$24.45 for supplies, a fact reconcilable only with the appropriation thereof as claimed by the plaintiff.

7. That a payment on account, with nothing more, is *primâ facie* evidence from which to infer a promise to pay the balance.

8. If not, the additional circumstances or evidence here require such a promise to be inferred.

9. That the learned Judge who tried the cause, having found as a fact a payment on account sufficient to take the same out of the Statute, and having heard the witnesses, his verdict should not have been set aside on a question of fact.

10. That the finding of the Court below is against evidence or the weight of evidence.

The respondent's reasons against the appeal were :—

1. That no payment was proved sufficient to take the case out of the statute. All that was attempted on the part of the appellant was to shew that he had purchased goods to a small amount from the respondent, but no agreement was proved that this amount should be considered and taken as a payment.

5. Even admitting that the said account amounted to a payment, yet it does not appear that it was a payment on account of a larger sum, and from all that appears it was a payment, if at all, in satisfaction of a contra account of like amount.

3. That the learned Judge on the trial found as a fact that the plaintiff ordered the goods without an understanding that they were to go on account of his claim. This prevents them being considered as a payment on account, as the appropriation should have been made there and then by consent of both parties. The appellant had no right to appropriate the goods as a payment afterwards : *Hart v. Nash*, 2 C. M. & R. 337 ; *Hooper v. Stephens et al.*, 4 A. & E. 71.

4. That inasmuch as the respondent's clerk states that they never assented to any appropriation of the said account for goods as a payment on account of the appellant's demand sued for herein, the weight of evidence on that point is in favour of the respondent.

5. That the said letters, considered as a whole, do not admit any liability from which a promise to pay the amount herein of the appellant's claim can be inferred.

6. That the said letter of the 4th of August, 1875, does not amount to a sufficient acknowledgment to take the case out of the Statute of Limitations, as no absolute promise to pay can be inferred from it : *Routledge v. Ramsay*, 8 A. & E. 221 ; *Waugh v. Cope*, 6 M. & W. 824 ; *Williams v. Griffith*, 3 Ex. 335.

7. That the said letter, being signed by an agent, is not admissible as an acknowledgment as against the defendant to take the case out of the statute, for the reasons in the

authorities stated in the judgment of the Court below: *Hyde v. Johnson*, 2 Bing. N. C. 779.

8. To shew that the delivery and acceptance of goods are equivalent to payment, it must be shewn that there was an agreement between the parties that the goods delivered on the one side should be taken in reduction of the demand on the other, and that the balance only should constitute the debt between them: *Addison* on Contracts, 4th ed., 1216; *Cottam v. Partridge*, 8 Sc. N. R. 834.

9. If the letter of the 4th of August, 1875, taken altogether, does not admit any liability, which it is submitted it does not, then it is not evidence for any purpose to take the appellant's claim out of the Statute of Limitations. That the said judgment is correct, and should be upheld, for the reasons and on the authorities therein cited and referred to. That the delivery of the said goods by the respondent could not be considered as part payment, unless it could have been pleaded in an action as such; if it could only be pleaded as a set-off, as it is submitted it could only be in this case, then it cannot be considered a payment. See judgment of Alderson, B., in *Cannan v. Wood*, 2 M. & W. 469.

The case was argued on the 17th March, 1877 (a).

*J. Bethune*, Q. C., for the appellant.

*M. C. Cameron*, Q. C., for the respondent.

The arguments and cases cited fully appear in the reasons for and against the appeal.

June 27, 1877 (b). BURTON, J. A.—The learned Chief Justice of the Queen's Bench appears to have misapprehended the object of the plaintiff in putting in evidence the letter of the 4th August, which I imagine was not offered as proving an acknowledgment in writing to take the case out of the statute, but as a piece of evidence

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(a) *Present*.—BURTON, and MOSS, JJ.A., GALT, J., and PROUDFOOT, V.C.

(b) *Present*.—BURTON, and MOSS, JJ.A., GALT, J., and PROUDFOOT, V.C.



tending, with the other facts and circumstances disclosed at the trial, to shew that there was an appropriation in 1872, with the consent of the defendant, of his contra account against the plaintiff's claim.

The facts are in a small compass, and the question resolves itself into whether the learned Judge, who tried the case without a jury, drew the correct inferences from those facts, as there appears to be no difficulty in applying the law if the conclusion he arrived at upon them was the proper one. If that conclusion is an erroneous one, it must I think follow in this particular case that there was no evidence which it would have been proper, had there been a jury trial, to submit to them. The evidence may be slight, but I think it is impossible to say that it would have been proper to withdraw it from the jury; and, if the jury had found upon these facts as the learned Judge has done, on a motion to set aside the verdict the consideration would have been, not whether the Judges would have decided the same way, but whether the verdict is such as reasonable and fair men might not unfairly arrive at—in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men.

That is the rule enunciated by Mr. Justice Brett in the House of Lords, in *Bridges v. The North London R. W. Co.*, 7 H. L. 233, and adopted by the House; and whilst admitting to the fullest extent the obligation of the Judges of this Court to review the finding of the Judge at the trial upon questions of fact, I am not prepared to overrule his decision merely on the ground that it is contrary to my individual opinion. I must be satisfied that the decision is wrong.

Unless, therefore, this is a case in which the Court can say there is no evidence, I do not see any ground for interfering with the learned Judge's finding; and I am more unwilling to interfere with it, inasmuch as the Court of Queen's Bench appears to have adopted it.

The learned Judge has found there was such an appropriation with the defendant's assent. The plaintiff does

not in his own evidence prove such assent, but merely shews an intention on his own part to purchase the goods to apply on his account against the defendant; that on receiving the account he did accordingly credit it, and advised either the defendant or his clerk that he had done so. The defendant and two clerks deny that they assented to any such arrangement, and apart from the letter of the 4th August, the only circumstance to bear out this contention of the plaintiff is, that no subsequent demand was made upon him for payment, a fact which, though consistent with the plaintiff's contention, would manifestly be insufficient to warrant a verdict in his favour. Does then the admission contained in the concluding paragraph of that letter supply the missing link in the evidence, so as to render it as a whole of that nature that ought to have been submitted to a jury, and upon which they could reasonably act.

During the progress of the cause, in which the costs now sued for were incurred, the defendant had made some advances in cash to pay witness fees and the cost of special juries, and in this letter, after declining to pay the account, he expresses a hope "that you," meaning the plaintiff, "may be able to make the amount out of the parties against whom you got judgment, as well as the advances made by me in cash, *and supplies charged to you since in my books.*"

The only supplies so charged were those comprised in the accounts rendered and credited, and it is not unimportant in this connection to refer to the defendant's own statements, that in the plaintiff's account in the defendant's ledger nothing is posted but the items comprising the \$24.50.

I do not see how, if there had been a jury trial, the learned Judge could have refused to submit the question to the jury, whether that admission did apply to the articles so purchased by the plaintiff, as he says, to apply on the account.

The denial, *at that time*, of a further liability beyond the payments already made appears to me to be immaterial.

The question is not whether the letter contains an admission of liability, but whether the admission of the payment is such as to establish a part payment of this specific account under circumstances which would be sufficient to take the case out of the statute.

Notwithstanding that denial of liability, the letter does establish to my mind that the defendant was fully aware that the contra account was appropriated to this specific account. He says, "I have your account in detail, settled and receipted, \* \* and the only unsettled matter I have any knowledge of is this old matter of the Hatch estate;" and then, in referring to the credits on this account, he specifies the cash advanced and supplies charged, which he hopes he will be able to make out of the judgment debtors and refund to him.

No doubt the effect of a part payment may be rebutted or overcome by proof that it was not designed as an admission of the defendant's liability to pay the residue, but in the absence of such evidence, nothing being shewn but the fact of a smaller sum on account of a larger and ascertained demand, and no accompanying circumstances to rebut the implication of a promise, as, for instance, a refusal to pay the remainder, there is, I should say, but one legitimate inference, viz., that the debtor recognized the claim, and the requisites to raise the implied promise to pay have been fulfilled.

It is true that the accounts on both sides were very loosely kept, but it was admitted that all other accounts, with the exception of the plaintiff's claim in this suit, and the small contra account which is relied on as part payment, have been arranged. The account constituting the plaintiff's demand may not, at the time of the alleged appropriation, have been rendered. The evidence is not very distinct on that point. The plaintiff in his evidence does say, "I got the things immediately after I rendered my account," but whether rendered or not, the defendant must have been fully aware of its existence, and that the amount had been ascertained by taxation, and was for a

large amount, as he says he frequently spoke of it, and instructed the plaintiff to issue executions, and although he says in his letter that Mr. Ball must be in error "about cash out, as I paid all the disbursements in cash during the progress of the suit," it is manifest that the error is on his part, as the only disbursements he made were for the jury and witnesses, all the other disbursements having been borne by the plaintiff.

The letter of the 4th of August, even if not as clear in its meaning as I think it is, raises a *prima facie* case that the supplies were applied in payment of this particular claim, as the plaintiff contends. The defendant does not offer any explanations, and the burthen of proof was shifted upon him to shew that it applied to something else.

The learned Judge has found upon the evidence that the defendant did assent to the appropriation in 1872, and the case seems to fall within the rule enunciated by Baron Parke, that to take a case out of the statute by part payment it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute, is that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any existing debt.

In the present case the defendant says, "I had frequent conversations with the plaintiff after the suit with Hatch was closed respecting the making the expenses, including my advance of expenses. I had often called on plaintiff asking him to make it." If it be true that this account of goods was applied with the defendant's assent, in 1872, as I think may be fairly inferred from the statement in his letter, then it was a payment on account of a much larger demand which was then definite and ascertained, and there is nothing shewn that it was accompanied by any circumstances or declaration of a nature to rebut the inference which would otherwise be drawn from it, that the debtor



admits and is willing to fulfil his obligation to pay the residue of the debt.

In several of the cases cited, the attendant circumstances under which the acknowledgment or part payment were made, were inconsistent with the promise of payment which the law would otherwise have implied from it.

Thus in *Davies v. Edwards*, 7 Ex. 22, no such promise could be implied, the payment being a dividend by order of the Insolvent Court.

In *Foster v. Dawber*, 6 Ex. 843, if what occurred there could be treated as a payment at all, it was a payment of the whole debt.

I am of opinion that there was evidence sufficient to sustain the finding of the learned Judge, and that such a payment was sufficient to save the account from the operation of the statute, and that the appeal should be allowed with costs, and the rule *nisi* to set aside the verdict discharged; but as the majority of this Court are of a different opinion, the appeal will be dismissed with costs.

I may perhaps remark that the Court would have been justified in refusing to entertain the appeal in consequence of the loose manner in which the case has been presented in the appeal book, which teems with inaccuracies, omissions, and misprints, and it was only by reference to the original record and exhibits that we were enabled to understand it at all. The registrar has received instructions not to receive books in future prepared with so little regard to the rule.

Moss, J. A.—The plaintiff's cause of action had clearly not accrued within six years before the commencement of this suit. It was therefore barred unless something was proved to have occurred within the six years, which had the effect of stopping the running of the statute and giving it a fresh commencement.

This the plaintiff alleges was the legal effect of the transaction in March, 1872, which he claims to have been equivalent to a part payment by the defendant.

The true question in the case it appears to me is, whether the character of a part payment can be attributed to what is proved to have then occurred; and the *onus* of establishing the affirmative of this proposition lies upon the plaintiff.

A good deal of criticism has been expended on the letter dated August 4, 1875, for the purpose of shewing that its terms are not so express and unconditional as to make it an acknowledgment of the debt now sought to be recovered. The Court below also seems to have held that this letter could not amount to an acknowledgment under the statute, because it was signed by an agent and not by the defendant personally. All this seems to me to be beside the question.

The learned Judge, who entered the verdict in favour of the plaintiff, did not hold, nor is it now contended, that the letter is in itself a sufficient acknowledgment in writing to remove the bar of the statute. It was treated, and properly treated, by the learned Judge as a piece of evidence.

In his view it aided the plaintiff's oral testimony, and established as a fact that in 1872 there was an agreement between the plaintiff and the defendant by which the price of goods previously obtained by the plaintiff from the defendant was credited upon the bill of costs now sued upon.

The language of the learned Judge shews unmistakably that he apprehended the precise question presented for decision. He says: "The question is merely whether there has been a payment sufficient to take the case out of the Statute of Limitations by the application of the account of \$24.55."

Then upon the plaintiff's testimony and the correspondence he finds, as a fact, that the defendant assented in 1872 to the application of the \$24.55 as a payment on the plaintiff's account.

This proves, in my opinion, that the learned Judge had a perfectly correct appreciation of the point on which the decision of the case must turn. If the conclusion of fact which he has drawn be well founded, there is no room for serious controversy.

It is beyond doubt that any transaction between the parties, which was by mutual consent to have the effect of discharging *pro tanto* the defendant, will be as effectual as an actual payment of money to stop the statute. The learned Judge found that there was such a transaction in 1872.

The question for our determination is, whether this finding should be sustained. If the limits of our enquiry were whether there was any evidence in support of the plaintiff's contention proper to be submitted to a jury, I think our decision should be in favour of the plaintiff. I do not say that a Judge could have withdrawn the case from the jury, if that mode of trial had been adopted. There was evidence to be considered, and it would have been the function of the jury to pronounce upon it. But I do not think that we can confine ourselves to this comparatively narrow enquiry.

The decision does not seem to have proceeded in any degree upon the estimate which the learned Judge formed of the credibility of the witnesses. It is not one of the cases in which, from the conflicting nature of the testimony, demeanour and manner are valuable auxiliaries in the attainment of the truth, and in which therefore the greatest weight is due to the opinion of the tribunal which has enjoyed the advantage of hearing and observing the witnesses while under examination. Even in such a case we must always keep it present to our mind that the Judge did possess this advantage beyond the Court, and make due allowance for it at any point where it could possibly have formed an element in the formation of judgment.

But as was pointed out in *Re Glannibanta*, L. R. 1 P. D. 283, the parties are entitled as well on questions of fact as on questions of law to demand the decision of the Appellate Court. The argument against reversing the decision of the Judge who had the living witnesses before him may be pushed too far. It is well answered by Bramwell, J. A., in *Bigsby v. Dickinson*, 4 Ch. D. 28. While bearing in mind the superior advantage which the learned Judge possessed,

and while making full allowance for this, we are bound to consider whether his inferences and conclusions are, in our opinion, well founded.

Taking this view of our functions, I proceed to examine the evidence in the case. It is clear that between the 5th of May, 1869, and the 25th of May, 1870, after the plaintiff's cause of action had arisen, the plaintiff at various times purchased at the defendant's store goods amounting to \$24.55.

The learned Judge has held, and, as I think, in strict accordance with the evidence, that the goods were ordered by the plaintiff "without any understanding that they were to go on account." The plaintiff, indeed, does not allege that there was any such understanding at that time. The evidence on the part of the defendant is, that the plaintiff ordered them "as any other customer would order them."

The plaintiff, I gather from the evidence, purchased other goods from the defendant during this interval, but these were always paid for in cash, and consequently no account of them was rendered to the plaintiff. On the 18th of March, 1872, the defendant rendered the plaintiff an account for the \$24.55. There is endorsed on the back of this account a memorandum, dated the 19th of March, 1873, "credited Henry Parker." The plaintiff also credited the amount in his books, but at what date he does not state.

All this, however, would be quite inadequate to form a part payment on account of the plaintiff's claim. The element of the defendant's assent to this appropriation of the account remains to be supplied. It is this element which I have been unable to discover in the case, and for want of which I think the plaintiff must fail. It certainly is not to be found in the plaintiff's own testimony. He says that he credited the amount to the defendant in his books: *that he got the things to apply on his account*; and that he told the defendant or his clerk—he thinks the defendant himself—that he had credited the amount on his account.



I have already pointed out that the learned Judge has found against the correctness of the statement that he got the goods to apply on his own account. His recollection, therefore, of what occurred, is not very precise. But it is unnecessary to lay any stress upon that, for he does not prove any communication to, much less any assent by, the defendant. His vague statement that he told the defendant or his clerk he had credited the amount falls far short of proof of a mutual agreement to appropriate this amount upon his claim. Indeed, at this time he had not rendered his bill, and he seems to have still been in expectation of recovering the amount from Hatch. When to this is added the express denial by the defendant and his clerks that the goods were got to be applied on his account, that he ever communicated that he had credited the amount upon this claim, or that such a step on his part had been assented to, there is not a shadow of reason for the contention that his own testimony established the existence of the agreement, which was made the foundation of the verdict in his favour.

On March 26, 1874, the plaintiff wrote the defendant a letter, enclosing him a note for some unmentioned amount, which he offers to take, although very considerably less, as he says, than the amount to which he is entitled. No account accompanied this letter, and as the plaintiff simply offered to accept a sum in gross, it does not seem to throw any light upon the present controversy. On May 22, 1875, the plaintiff wrote the defendant another letter in which he says: "I send your account as appears in my book. The taxed costs in *Hatch v. Parker* amount to \$463.40, and I have credited your witnesses \$104.50, and paid to juries \$108. *I have also credited account received, \$24.55.* Any amount since that date must be deducted from my account. As I am very much in want of money, and the amount has been standing over five years, I trust you will close it without delay. I am quite willing to take a note at a reasonable date. Any errors or omissions I will gladly correct." So far as appears this is the first occasion on which any account was rendered to the plaintiff. Although I do not

think that the precise language of this communication should be measured with any great nicety, it is not unimportant to observe that the plaintiff says: I *have* credited account received, \$24.55. So far as it goes, this is opposed to the theory that there was an agreement to credit it made three years before.

On the 30th July, 1875, the plaintiff again wrote to the defendant, requesting him to send his account and to arrange the amount due. The evidence seems to shew that at this time the defendant had no other account against the plaintiff than the \$24.55. I presume that the plaintiff can hardly have understood this to be the case. If he did, the language of these letters is certainly inconsistent with the view that the \$24.55 had been settled by the agreement to apply it upon this claim. It would have then been idle to say that any amount since the date of that account must be deducted, or to request the delivery of the defendant's account.

On August 4th, 1875, the defendant wrote in reply the letter which has been so much discussed, and without which it seems to be conceded on all hands the plaintiff could not possibly succeed. The defendant thereby repudiates all liability for the costs in the Hatch suit on the ground that the plaintiff had stated he would never ask for them, as he could make them out of the Hatch estate. He proceeds: "And as you know that I have never troubled you about the matter since, which is 9 or 10 years ago, and that you must be in error about cash out, as I paid all the disbursements in cash during the progress of the trials. Trusting that you may be able to make your accounts out of the parties against whom you have judgment in the case, as well as the advances made by me in cash, *and supplies charged to you since in my books.*" It is upon the last sentence that the defendant is sought to be fixed with liability. I think that if the plaintiff had sworn to any agreement, this would have been corroborative evidence. Even if the circumstances had rendered it highly probable that such an agreement had been made, the letter might

have tended to support its existence. But I have already shewn that the plaintiff by no means proves any such agreement, and that in my opinion the balance of probabilities leans against, and not towards, its existence.

Resting alone, I think it inadequate to establish the proposition that in 1872 there was a mutual assent to the application of the \$24.55 as a payment on the plaintiff's account.

The letter certainly does not contain any express or unambiguous admission to that effect, nor do I think that any such admission is impliedly involved in the single passage upon which so much reliance was placed. That passage is, in my opinion, quite consistent with the fact being that the plaintiff never informed the defendant that the price of these goods had been credited on his account, until he wrote the letter of 22nd May, 1875. I cannot read the letter of 24th August, 1875, so strongly against the defendant as to find in it reasonable evidence of the existence of an agreement in 1872, of which there is really no other proof. Taking the letter as a whole, it appears to me to mean no more than that the defendant, who had been in May previously advised by the plaintiff of the application of the account, did not choose to raise any dispute upon the point. No doubt the letter shews that at its date the defendant did not care to contest this appropriation, but it does not in my judgment prove that he had previously given any assent.

It is not without reluctance that I have arrived at this conclusion. I perceive no ground on which the defendant can in common fairness refuse to pay the plaintiff's claim. I think it is clear that the plaintiff discharged his duty towards his client with fidelity and skill. His claim seems to be just and reasonable. His delay in presenting it has in no way prejudiced the defendant. But these considerations, however potent they ought to be with the defendant, cannot influence the judgment to be formed upon the plea of the statute.

I think the appeal must be dismissed, with costs.

PROUDFOOT, V. C.—I think this case turns upon the effect of the alleged payment, for the letter of the 4th of August, 1875, does not admit the existence of any debt which had not been already satisfied. An acknowledgment of a debt, to take the case out of the statute, must be such as would authorize us to imply from it a promise to pay: *Linsell v. Bonsor*, 2 Bing. N. C. 241. In this letter the defendant repudiates any liability to pay, and in the face of such repudiation we cannot imply a promise.

As to the payment. On the 18th March, 1872, the defendant rendered to the plaintiff an account consisting of four items, beginning 5th May, 1869, and ending 25th May, 1870, amounting to \$24,55. On the 19th March, 1872, the plaintiff credited the defendant with the amount in his books. He says: "I got the things to apply on my account, and I told him (defendant) or his clerk, I think himself, that I had credited the amount in my account." The defendant says: "I never had any notice that my account had been credited to me in the plaintiff's account; there was no arrangement; he ordered the goods as any other customer would order them." The defendant's clerks, McKay and Hill, deny ever making any arrangement with the plaintiff about goods going on account. Hill says, "the goods were bought as any other customer would buy them."

Upon this evidence I think the Judge at the trial drew the correct conclusion, that the plaintiff ordered the goods without any understanding that they were to go on account. The plaintiff does not say he got the goods from *the defendant* with that understanding. He may have so intended in his own mind, but does not say he told the defendant when ordering them that they were for that purpose.

The question is thus further narrowed down to the point, whether the defendant, in 1872, assented to the application of the \$24,55 as a payment on the plaintiff's account, and if he did so, whether he is liable for the balance of the account.

The only evidence on the subject is the assertion of the plaintiff, and the denial of the defendant. For the con-



cluding clause of the defendant's letter of the 4th August, 1875, seems to me of no value, as it admits no liability beyond payments already made. The Judge who tried the cause finds as a fact that the defendant did assent to the application of the \$24,55 as a payment in the plaintiff's account. The Judge, who took the evidence, and saw the demeanor of the witnesses, is better qualified than we can possibly be to say what credit is to be attached to them. Having found a fact, upon such conflicting evidence, I do not feel disposed to interfere with it, and shall assume that such assent was given.

Does the assent to the credit on account bind the plaintiff to pay the balance? No account had been rendered at this time. The defendant did not know the amount of the claim against him.

In *Tanner v. Smart*, 6 B. & C. 603, it was decided that a clear acknowledgment of a debt, unaccompanied by an express promise to pay, or such an acknowledgment as that a promise to pay may be inferred, is insufficient to take the case out of the statute.

The principle laid down in that case as to an acknowledgment, has been applied in all the cases of part payment. Thus in *Tippets v. Heane*, 1 C. M. & R. 252, Parke, B., says: "In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of the debt. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. \*

\* But the case must go further; for it is necessary, in the third place, to shew that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt."

In *Davies v. Edwards*, 7 Ex. 22, this language was repeated by the same Judge, and concurred in by the

Court. And in *Foster v. Dawber*, 6 Ex. 839, where a receipt was given for the principal and interest of two promissory notes, intending to release them, it was argued that the receipt for the interest was a part payment. There was no payment in fact, and was only part of the transaction in which the defendant by no means promised to pay the notes, but on the contrary thought he was getting a discharge for them. "It was no part payment within the Statute of Limitations, supposing it to be proved within the statute: because part payment within the statute means payment of a portion, accompanied with an acknowledgment of a greater demand being due: that is the only ground on which a part payment takes the case out of the statute."

In *Morgan v. Rowlands*, L. R. 7 Q. B. 493, the plaintiff, within six years, had sued the defendant for interest on the note, and recovered judgment and received payment; but as this was not accompanied by any promise to pay, or that such a promise could be inferred in fact, it was held insufficient to take the case out of the statute. "The defendants appear to have resisted the payment of interest to the last. The County Court Judge decided against them; and in obedience to the judgment they paid. It is impossible to say that from such a payment any promise to pay the principal can be in fact inferred. If there were any ground for saying that a promise in law was sufficient, the result might be different." See also *Chasemore v. Turner*, L. R. 10 Q. B. 500; *Smith v. Thorne*, 18 Q. B. 134; *Wainman v. Kynman*, 1 Ex. 118.

Now, applying the principle of these cases here, it does not seem to me that the evidence establishes that the payment was made on account of the debt sued on. It appears that the plaintiff had other accounts, which are not shewn to have been then paid, and did other business for the defendant; and the assent of the defendant to getting credit on account does not necessarily imply that it was to be a credit on the account now sued on. The plaintiff had another account against the defendant, contained in a

letter of 29th January, 1867, which was only paid three or four years ago, and was still owing when the credit was given. The defendant, if notified, was not informed on what account the credit was given.

Supposing the payment to have been made on this account, however, I fail to see any circumstance from which we can infer a promise to pay the remainder. As I have said, the account had never been rendered to the defendant. But the defendant says the plaintiff told him he would make the costs out of the Hatch estate, and that the defendant need not be anxious about it, as the plaintiff had more interest in it than the defendant had,—the interest of the defendant being the money he had advanced for expenses in carrying on the suit.

The plaintiff, in his cross-examination, in fact corroborates this. It seems the plaintiff, while this account was in his book, got other articles from the defendant,—wheat for his farm, and pork, for which he paid; and in reference to this he says, "When I got the wheat for my farm and paid for it, I expected to get the amount of the action from Hatch; I expected to get it, until the Master in Chancery refused to let me prove the amount against the Hatch estate." I think this very correctly explains the position of matters. The plaintiff only intended to look to the Hatch estate; and it was not until he found an unexpected obstacle in his way that he sought to make the defendant liable. And the assertion of the defendant, in the letter of 4th August, 1875, that the plaintiff told him years ago that he would never ask him for any fees, as he could make them out of the estate, is quite in harmony with the evidence, and the acts of the plaintiff. At all events, I cannot say that a promise in fact to pay the balance of the account can under such circumstances be inferred.

Much stress was laid upon that letter—the last paragraph: "Trusting that you may be able to make your accounts out of the parties against whom you got judgment in the case, as well as the advances made by me in cash, and supplies charged to you since in my books."

When that was written there were a number of charges to the plaintiff in the defendant's books not written off to which the phrase cash and supplies were applicable. After the commencement of this suit these charges were written off, except the one item of \$24.55. But the defendant's attention was not directed to this item, and indeed I should think the cash and supplies were not intended to refer to it at all. As the plaintiff in his letter of the 22nd of May, 1875, had told the defendant: "I have also credited account received, \$24.85. *Any amount since that date must be deducted from my account.*" The account mentioned in that letter was the Hatch account, and the plaintiff suggested that further sums might have been received on account of it. And to these, it is fair to suppose, the defendant alluded in the letter of the 4th of August.

The bill sued on contains many other matters than the Hatch account, but all the rest seem to have been considered as paid, and the only item in dispute at the trial was that account.

I think the judgment right, and that the appeal should be dismissed.

GALT, J., concurred with MOSS, J. A., and PROUDFOOT, V. C.

*Appeal dismissed.*

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## WRIGHT V. MORGAN.

*Mortgage suits—Statute of Limitations.*

*Held*, reversing the decision of Proudfoot, V. C., 24 Gr. 457, that it is unnecessary to plead the Statute of Limitations in mortgage suits to prevent the recovery of more than six years' arrears of interest in taking the accounts before the Master, as the filing a disputing note is sufficient.

THIS was an appeal from an order of Proudfoot, V.C., allowing the plaintiff interest for more than six years before the filing of the bill in a mortgage suit, as an answer setting up the Statute of Limitations had not been filed, reported in 24 Gr. 457.

The pleadings are sufficiently stated there.

The appellant's reasons of appeal were:—

1. Only six years' arrears of interest are chargeable as against the land mortgaged, and the decision of the Master was right in allowing interest for that period only: Consol. Stat. U. C. ch. 88, sec. 19.

2. In a suit upon a mortgage security, the charge upon the land, and any remedy upon a covenant contained in such mortgage, must be treated as completely distinct, and as if made in separate deeds; and in all cases, so far as the suit is one to realize the charge on the land, six years' arrears only are allowed; and the bill in this case being filed against the defendants as owners of the equity of redemption, and claiming no right under any covenant, the plaintiff must be treated as only claiming six years' arrears of interest: *Sinclair v. Jackson*, 17 Beav. 405; *Hughes v. Kelly*, 5 Ir. Eq. 286, 3 Dr. & W. 482.

3. Under the decree herein the Master had full power to take the account, and in doing so, to enquire into the amount for which the land was liable, upon the facts stated in the bill, and rightly found such amount to be the principal and six years' arrears of interest: Consolidated Chancery Order, 220; *Sterling v. Riley*, 9 Gr. 343; *Grand Junction R. W. Co. v. Bickford*, 23 Gr. 302.

4. The rule, requiring the Statute of Limitations to be pleaded, only applies when such statute is pleaded to the corpus of the claim, or some portion of it: *Penn v. Lockwood*, 1 Gr. 547; *Drought v. Jones*, 2 Ir. Eq. 303.

5. The object of allowing the defendant to file a note disputing the amount claimed in mortgage suits is, to save the expense of putting in an answer when such answer would not dispute the facts stated in the bill, but merely go to shew that upon such facts the amount claimed is too large.

The following were the respondent's reasons against the appeal:—

1. The order made by the learned Vice Chancellor is proper, and follows the decision of Blake, V. C., in *Cattanach v. Urquhart*, 6 P. R. 28.

2. The special defence given by statute must be set up by answer: *Butler v. Church*, 16 Gr. 205.

3. The Statute of Limitations must in all cases be pleaded: Per Lord Cranworth in *Ridgway v. Wharton*, 3 DeG. M. & G. 691; *Walsh v. Walsh*, Jones & Carey 52; *Prince v. Heylin*, 1 Atk. 493; *Harrison v. Borwell*, 10 Sim. 382; *Holding v. Barton*, 1 Sm. & G., App., 25.

4. The statute must be pleaded to any part of the relief prayed for and decreed: *Carroll v. Eccles*, 17 Gr. 532; *Mitford* on Pleading, 5th ed., 301; *Darby* on Limitations, 439.

5. All defences must be by answer or demurrer: General Order, 546.

The case was argued on the 15th June, 1877 (a).

*H. J. Scott*, for the appellant.

*W. Mulock*, for the respondent.

The arguments fully appear in the reasons for and against the appeal. The following additional cases were cited:—For the appellant: *Wilde v. Wilde*, 20 Gr. 532. For the respondent: *Dowell v. Burke*, 9 Ir. Eq. 85;

*Edmunds v. Waugh*, L. R. 1 Eq. 418; *Roch v. Callen*, 6 Ha. 531.

June 16, 1877 (a).—BURTON, J. A., delivered the judgment of the Court.

We are all of opinion that the course pursued by the Master at Barrie in taking the accounts was the correct one, and that this appeal should be allowed.

If the principal and interest secured by the mortgage had been barred by the Statute of Limitations, and the defendant had disputed the right of the Court to make a decree against him at all, he must have raised that question by answer, and the issue so raised would have been determined by the Court, rendering any reference unnecessary in the event of the issue being found in favour of the defendant. But in a case like the present where the defendant has no disposition to dispute the facts set forth in the bill, but, admitting the validity of the mortgage, disputes only the existence of a portion of the interest as a charge upon the land, what issue could he raise by answer for the decision of the Court? Whether more or less is due upon the security is no answer to the prayer of the plaintiff's bill, and the Court would take no evidence upon it, but would pronounce precisely the same decree as was made here, referring it to the Master to find how much was due for principal and interest on the mortgage security.

It would be placing a very narrow construction upon the general order which enables a defendant to file a note disputing the amount claimed to hold that in a case like the one before us a party who has no wish to dispute the facts stated in the bill, but who is merely desirous of having the accounts properly taken, should be compelled to file an answer, which would be attended with precisely the same result, that of a general reference to the Master. I am aware of no principle which should preclude the defendant from shewing this answer to the demand in the Master's

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(a) *Present*.—BURTON, PATTERSON, MOSS, JJ.A., and BLAKE, V.C.

office in the same way as he is entitled to shew payment, set-off, or any other defence which it is the constant practice for parties to raise before the Master on such a reference.

*Cattanach v. Urquhart*, 6 P. R. 28, was cited as an authority for the order made by the learned Vice-Chancellor; but Blake, V. C., who decided that case, explained on the argument yesterday that his recollection of the case was, that it was an application to vacate a *præcipe* decree, and allow the defendant to put in an answer of the Statute of Limitations going to the entire claim of the plaintiff, and it is clear on reference to the case that that is so.

The learned Vice-Chancellor, in giving judgment, remarks: "Here the defendant proposes to raise that which is a complete defence to the whole of the plaintiff's claim, and which, if allowed as a defence, would shew them not entitled to any decree."

That decision is quite consistent with the judgment we are now giving, and the reasoning of the learned Judge all tends to shew that he would have considered that where, as in the present case, the statute applies only to a portion of the interest, that matter can be properly enquired into in the Master's office.

The appeal should, we think, be allowed, with costs.

*Appeal allowed.*

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## GRIEVE V. WOODRUFF.

*Dower—Demand—Costs—32 Vic. c. 7, O.*

The plaintiff filed the bill for dower. The defendant admitted her title, but submitted that her proper remedy was at common law under the Dower Act of Ontario, and claimed the same benefit of that objection as if he had demurred.

*Held*, affirming the judgment of BLAKE, V. C., that the jurisdiction of the Court of Chancery in cases of dower had not been ousted by that statute; and that the defendant was properly made to pay costs up to and inclusive of the hearing.

*Held*, also, that under the existing law no demand is necessary before suit.

THIS was an appeal from a decree of Blake, V.C.

The plaintiff filed her bill to establish her claim to dower in certain lands of which her husband died seized, against the defendant, who claimed through a purchaser from the devisees under her husband's will.

The defendant, by his answer, while admitting the plaintiff's title, asserted that he had never refused to give her her dower, and consented that she should have it; but submitted that her proper remedy was at common law, under the Dower Act of Ontario, and claimed the same benefit of that objection as if he had demurred.

It appeared that the defendant had retained part of the purchase money to meet the plaintiff's claim for dower. The plaintiff's solicitors had written to the defendant before suit, demanding her dower, to which he sent the following reply: "I have sent your letter to Messrs. Lount & Lount, barristers, Barrie, who have done my business in connection with the above lot, and requested them to communicate with you about it. (The land is unimproved.)"

The case was heard upon bill and answer, and a decree was made allowing the plaintiff her dower and costs up to, and inclusive of, the hearing.

The defendant appealed.

The appellant's reasons of appeal were:—

1. No sufficient demand of dower was proved at the hearing to entitle the plaintiff to costs up to, and inclusive of, the hearing.

2. No such refusal to assign dower is alleged by the bill of complaint, as to entitle the plaintiff to costs.

3. The proceedings to be taken by the plaintiff to obtain an assignment of dower should have been in the manner and form mentioned in the Dower Act of Ontario, and the decree is erroneous in awarding costs to the plaintiff contrary to the spirit of the Dower Act of Ontario.

4. The defendant, by his answer, admitted the right of the plaintiff to dower, and expressed a willingness to assign the plaintiff her dower, and, looking at the said Dower Act, no costs should have been given against the defendant, at least after the filing of the said answer, but the costs should have been borne as in section 40 of the said Act.

5. The defendant never denied that the plaintiff was entitled to dower out of the lands in question or refused to assign the same to her.

6. The defendant was not allowed a reasonable time in which to enable him to assent to the demand contained in the letter of the plaintiff's solicitor in the depositions referred to.

7. The bill of complaint shews no grounds for equitable relief, and, therefore, the costs of suit should have been determined as if the plaintiff had instituted proceedings in a Court of law, and the said decree should have ordered the plaintiff to pay the defendant's costs after answer: *Craig v. Templeton*, 8 Gr. 485; *Losee v. Armstrong*, 11 Gr. 517; *Angell v. Davis*, 4 M. & C. 360; *Lucas v. Calcraft*, 1 Bro. C. C. 134; *Worgan v. Ryder*, 1 Ves. & Bea. 20; *Curtis v. Curtis*, 2 Bro. C. C. 631; *Bamford v. Bamford*, 5 Ha. 203; 32 Vic. ch. 7; 36 Vic. ch. 8; 47 Vic. ch. 7; *Norton v. Cooper*, 5 DeG. M. & G. 728; *Menzies v. Connor*, 3 Mac. & G. 648; *Chappell v. Purday*, 2 Phillips 227.

The following were the respondent's reasons against the appeal:—

1. Under sections 31 & 32 of 36 Vic. ch. 8, O., the plaintiff was entitled to maintain her suit in equity instead of proceeding at law.

2. A demand having been made upon defendant before suit, and the defendant being well aware of plaintiff's right, and having, in fact, kept back part of his purchase money to answer the plaintiff's dower, it was his duty to admit the claim and notify the plaintiff's solicitors before suit that he did so.

3. Instead of taking this course he answered the demand by denying the right, and so occasioned the suit.

4. He also appeared at the hearing, and, by his counsel, denied the right to relief in this Court.

5. Under section 48 of the said Act, as well as by the practice of the Court, it was competent for the Court to make the order complained of as to costs.

6. The plaintiff was also entitled to costs by virtue of the 25th sec. of the Dower Act, 32 Vic. ch. 7, O.

7. The order as to costs is in accordance with the justice of the case, and is not opposed to any express enactment, or to any recognized principle of the Court of Chancery on which costs are disposed of.

8. No appeal will be allowed upon a matter of discretion : *Sheffield v. Sheffield*, L. R. 10 Ch. App. 206 ; *McDonell v. McKay*, 2 Chy. Ch. 243 ; *Chard v. Meyers*, 3 Chy. Ch. 120.

9. No appeal will be allowed upon a mere question of costs : *Bush v. Trowbridge W. Co.*, L. R. 10 Chy. App. 463.

10. The reasons given in the judgment of the learned Vice-Chancellor shew that the decree is proper : *Craig v. Templeton*, 8 Gr. 483 ; *Losee v. Armstrong*, 11 Gr. 517 ; *Harris v. Morden*, 17 U. C. R. 278 ; *Street v. Rowe*, 8 C. P. 213.

The case was argued on the 20th March, 1877 (a).

*W. Mulock*, for the appellant.

The *Attorney General*, (with him *J. S. Ewart*,) for the respondent.

The arguments fully appear in the reasons for and against the appeal.

The following additional cases were cited :—For the

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appellant : *Witt v. Corcoran*, L. R. Eq. 53. For the respondent : *Harris v. Harris*, 11 W. R. 62 ; S. C. 1 N. R. 43 ; *Jenour v. Jenour*, 10 Ves. 562 ; *Owen v. Griffith*, 1 Ves. Sen. 249 ; *Quin v. McKibbin*, 12 U. C. R. 323 ; *Westbrooke v. Browett*, 17 Gr. 339.

June 27, 1877 (a). BURTON, J. A.—Before the passing of the several Acts relating to dower in this Province, if a claimant proceeded by writ of dower she was entitled to no costs, and equity followed the law in that respect if she proceeded in a Court of equity.

Under the Dower Act, which was in force when *Craig v. Templeton*, 8 Gr. 483, and *Losee v. Armstrong*, 11 Gr. 517, were decided, it was provided that in case it should appear on the trial that a demand in writing had been made of the dower claimed one month before action brought, costs should be allowed to the demandant, but if the tenant offered to assign the dower before action brought, the demandant should not recover costs.

No such provision is contained in 32 Vic. ch. 7, but the tenant under that Act could always avoid being made liable for costs by filing with his appearance an acknowledgment that he was the tenant of the freehold, together with his consent that the demandant might have judgment for her dower, and might take the proceedings authorized by the Act to have the same assigned to her.

It seems to have been assumed in this case that a demand was necessary, and that the omission to comply with the demand entitled the plaintiff to costs ; but under the existing law no demand is necessary, and the plaintiff, when proceeding under the statute, is entitled to no costs, if the tenant takes the proper steps to admit her claim.

It was therefore contended that if the plaintiff, instead of taking proceedings under the statute, elected to proceed in equity, she should be in no better position as to costs than if she had proceeded under the statute.

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(a) *Present*.—BURTON, PATTERSON, MOSS, J.J.A., and PROUDFOOT, V.C.



But, to make the analogy complete, the tenant should as nearly as possible have adopted a similar course to that pointed out in the Act. Has he done so?

Under the common law proceedings, on filing the acknowledgment and consent prescribed, the demandant enters judgment, and obtains a writ of assignment of dower in the manner pointed out in the Act. The defendant here could have allowed the bill to have been taken *pro confesso*, or could have simply admitted the facts and claimed that no costs should be taxed against him; but in addition to the admission, the defendant in effect demurs, rendering it necessary for the plaintiff to appear by counsel and maintain her right, notwithstanding the passing of the Act 32 Vic. ch. 7, to pursue her remedy in a Court of equity. That involved a question of some nicety, and the plaintiff was either liable to have her bill dismissed, or to retain counsel to urge that her right to elect her forum was not taken away by that Act, the second section of which provides that "All actions of right of dower, or of dower *unde nihil habet* shall be brought and carried on under the provisions of that Act."

The third ground of appeal maintains that the proceedings should have been in the manner and form mentioned in the Dower Act of Ontario, and it was urged before us that that was the proper mode of proceeding. I apprehend that the new mode of procedure applies only to the common law remedies, which are referred to in the second section, and that it was not intended to deprive the Court of Chancery of the jurisdiction it already possessed over the same matters, as it is not to be supposed that the Legislature would effect a change of so much importance without a formal and explicit expression of its intention; but would the plaintiff have been justified in omitting to instruct counsel to maintain her right, thus pointedly challenged in the 9th paragraph of the defendant's answer?

The learned Vice-Chancellor did not, as I assume, deliver any written judgment, and it is impossible to say how far this circumstance, or the fact that the right of the plaintiff

was in the letter of the 13th of January resisted on the ground that the land was unimproved, and the further fact that the sum of \$300 was retained to indemnify the defendant against the claim, and that he had rather disingenuously concealed that fact, and erroneously stated the purchase money to be \$300 less than it really was—I say it is impossible now to say how far some of these matters may have influenced his discretion in allowing costs. Had the defendant raised the question intended to be raised in the 9th paragraph of his answer by demurrer, he would have been subjected to costs on the demurrer being overruled. Why should he be in a better position when he raises the question as he has done?

In *Chappell v. Gregory*, 2 DeG. J. & S. 111, it was laid down that where costs are not given against rule or principle it requires a very strong case to induce the Appellate Court to depart from the view of the original Court as to costs. Lord Justice Knight Bruce, in the same case, says: "I acknowledge myself not entirely satisfied that on the merits of the case I should have arrived at the view of his Honour as to costs. \* \* An able and careful lawyer might come to one conclusion, another equally able and careful lawyer to another conclusion. I think it would be wrong in a such a case to depart from the view of the Court appealed from, and, therefore, not disclaiming the jurisdiction to vary the order as to the costs alone, I do not think the case one in which it is right for us to exercise it."

In *Cotterell v. Stratton*, L. R. 8 Ch. App. 301, where the Court, in a redemption suit, had disallowed costs, the Court entertained the appeal, and reversed the decision on that point, on the ground that the mortgage stands as a security not only for principal and interest but for costs, and that the right resting substantially upon contract can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract.

I am of opinion that in this case, the defendant not having

admitted the plaintiff's claim simply, but having raised the question of jurisdiction, it was discretionary with the learned Vice-Chancellor to grant or withhold costs, and that it is not a case in which this Court should interfere.

The appeal therefore should, in my opinion, be dismissed, with costs.

Moss, J. A.—It was urged that the ground upon which costs were awarded against the defendant was, that he had not assented to a demand to assign dower, which had been made on behalf of the plaintiff.

I think it is not an unreasonable inference from the proceedings that both the parties to the litigation were under the impression that if the plaintiff made a demand before instituting her suit, the defendant was bound to offer to assign under peril of being condemned to pay costs.

The plaintiff's solicitors wrote a letter before suit demanding dower, and they seem to have deemed it in some manner material to their case to prove its contents. On the other hand the defendant, by his answer, expressly denied that any sufficient demand of dower or of arrears of dower had ever been made.

One of the grounds taken for the reversal of the decree in the printed reasons is, that no sufficient demand was proved to entitle the plaintiff to the costs up to the hearing; and she meets this in her reasons against the appeal by alleging that a demand was made upon the defendant before suit, and that being aware of the plaintiff's right it was his duty to have notified her solicitors that he admitted her claim.

These contentions seem to indicate that the parties supposed the rule to be that if a sufficient demand were made, and no assent were given, the plaintiff would be entitled to costs; but it does not appear that the learned Vice-Chancellor concurred in this view or awarded costs upon the assumption that such a rule now existed. On the contrary, other reasons appear for compelling the defendant to pay costs, which, no doubt, influenced the learned Judge.

Although the defendant, in the present state of the law, is under no obligation to give any admission until called upon to answer the plaintiff's claim in Court, it is only reasonable to require that then the admission should be as unambiguous and unqualified as that exacted where the proceedings are conducted under 32 Vic. ch. 7. If the defendant, instead of alleging that he has no opposition to offer to the recovery of the dower, chooses to raise any substantial contest, he cannot fairly claim in the event of failure to be exempt from the ordinary penalty.

Instead of admitting the plaintiff's right to recover in this suit without qualification or controversy, the defendant, accompanies a hesitating and ambiguous concession of the abstract existence of the right with the positive contention that the plaintiff had erred in selecting the Court of Chancery as her forum, and that she should have proceeded in the manner and form mentioned in the Dower Act of 1869. He asks that the same benefit should be given to this objection as if he had demurred, and he expressly prays for a dismissal of the bill with costs.

I cannot doubt that the combined effect of his allegations is, that although he now admits that the plaintiff is entitled to dower, when she proceeds to claim it in the proper manner, he contends that she is without relief in equity, and that her bill must fail. Such an answer is widely different from that which the Act of 1869 prescribed for a tenant of the freehold, who wished to escape payment of costs to a dowress.

The Vice Chancellor may also have thought that in view of the fact that the defendant had, upon purchasing these lands, retained a part of the price to indemnify him against the plaintiff's claim, his answer was not so full and candid as might have been expected from a man willing to accord her rights without litigation.

On the whole I think that elements appeared in this case which abundantly warranted a judgment charging the defendant with costs, and that the proper inference, from what appears before us, is that the Vice-Chancellor did not



intend to lay down any general rule that where there was a demand unassented to before the bill filed, the plaintiff is entitled to costs.

PROUDFOOT, V. C.—The costs of dower suits are generally regulated by the practice in such cases at law. And where no vexatious defence is raised the plaintiff gets no costs; *Beames on Costs*, 35; *Losee v. Armstrong*, 11 Gr. 518: *Craig v. Templeton*, 8 Gr. 485.

The practice at law is governed by the Dower Act of 1868 (32 Vic. ch. 7). The 16th section enacts that a defendant may file an appearance and acknowledgment that he is tenant of a freehold, together with his consent that the demandant may have judgment for her dower, &c., and in every such case the demandant may enter judgment, &c., but she shall not be entitled to tax or recover costs against the defendant. The 25th section gives plaintiff costs, unless where in the Act there is an express declaration to the contrary. The costs of the assignment are provided for by the 40th section.

The defendant's answer in effect admits the plaintiff's title to dower: that defendant is tenant of the freehold: that he is willing that the plaintiff should have her dower, and consents to her having it. And had the answer stopped there, the plaintiff would not have been entitled to costs under, or by analogy to, the 16th section of the Dower Act. But by the 8th section of his answer the defendant submits that the plaintiff should have taken the proceedings to obtain an assignment of her dower in the manner and form provided by the Dower Act, and claims the same benefit as if he had formally demurred to the bill.

Whether the plaintiff proceeded under the Dower Act, or by bill in Chancery, was a matter of the utmost indifference to the defendant, for so long as he admitted her title, and consented to her getting her dower, he would be liable to no costs, except such of the costs of the assignment as he is subjected to by the 40th section. The only reason I can imagine therefore for this contention was to harass the

plaintiff with a vexatious cavil, which might injure the plaintiff, but could be of no service to him.

In *Bamford v. Bamford*, 5 Hare 203, the defendant denied the title of plaintiff and failed, and was exempted from costs. Wigram, V. C., says: "On a bill to assign dower, the rule is that no costs shall be given on either side; but if the defendant adds another case, as by disputing the title of the plaintiff, denying the marriage, or the seizin of the husband, as in this case, or sets up any other ground of defence on which he fails, he may be liable to pay the costs of the suit occasioned by that unsuccessful defence." The defendants there had been misled by information obtained from the office of the Secretary of State, and on that ground were not made to pay costs.

In *Fry v. Noble*, 20 Beav. 598, 605, the defendant contested the right to dower under the construction of the Dower Acts. The plaintiff was allowed her costs. The Master of the Rolls says: "This is not, in fact, one of the cases in which, upon an undisputed question, the plaintiff comes merely for the purpose of having partition, or the dowerable lands set out by metes and bounds; but it is, in truth, a disputed right to dower, resisted upon grounds which failed, though I admit the question was one of considerable nicety, and justified the defendant in contesting the plaintiff's right. But I repeat the observation which Lord Cottenham frequently made, that the mere fact of a case being one of difficulty, is not a sufficient ground for saying that the person who is in the right shall not recover what he claims, together with the costs to which he has been subjected in obtaining it." And, notwithstanding that the conduct of the defendant had been as proper as it was possible to be, the plaintiff got her costs, and this decree was affirmed by the Lord Justice on re-hearing, 7 DeG. M. & G. 687.

In *Craig v. Templeton*, 8 Gr. 483, 485, the decree was made without costs, where the defendants contested the right to dower out of unpatented lands, Esten, V. C., saying that a defendant will be made to pay costs if he fail in an

*unreasonable* defence. But as he had not offered a *vexatious* opposition to the plaintiff's claim, he was not made to pay costs. The principle acted on in *Fry v. Noble*, *supra*, would have entitled the plaintiff to her costs in *Craig v. Templeton*.

In *Losee v. Armstrong*, 11 Gr. 518, the defendant made no defence.

In *Lucas v. Calcraft*, 1 Br. C. C. 134, Lord Thurlow says, that "In cases where there is an apportionment of dower by commission, not by writ, costs are not to be given, unless previous questions are raised, in litigating of which the party is vexatious. And *Worgan v. Ryder*, 1 V. & B. 20, is to the same effect.

I apprehend that the jurisdiction of equity in cases of dower has not been ousted by the Dower Act. But that is a subject the defendant has chosen to litigate, and, without any conceivable benefit to himself, has compelled the plaintiff to maintain her right. It is quite immaterial whether the costs have been increased by the proceeding or not. In most of the cases the costs were not increased by the defence. But the defence itself is the objection. I think this defence unwarrantable and vexatious, and that the defendant should enjoy the pleasure of settling the law on the subject, and paying the costs of doing so.

The appeal should be dismissed, and with costs.

PATTERSON, J. A., concurred.

*Appeal dismissed.*

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Fol. 16 O.R. 658.

GEORGE MCHARDY V. THE CORPORATION OF THE TOWNSHIP  
OF ELLICE AND THE CORPORATION OF THE TOWNSHIP  
OF DOWNIE.

*Road between townships—Bridge—"River"—Duty to repair—Municipal  
Act of 1873, secs. 413, 416.*

A stream called Black Creek from 30 to 40 feet in width, with clearly defined banks, crosses the road forming the boundary line between the townships of Ellice and Downie, and is crossed by a bridge on that road. The plaintiff sustained injuries through the approach to this bridge being out of repair, and sued the townships therefor.

Sec. 413 of the Municipal Act enacts that it shall be the duty of county councils to maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and sec. 416 provides that in case a road lies wholly or partly between adjoining townships, &c., the councils of the municipalities between which it lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road.

*Held*, reversing the judgment of the Queen's Bench 37 U. C. R. 580, that the Black Creek was a river, within the meaning of sec. 413; and that the county council therefore, and not the defendants, was liable.

THIS was an appeal from the judgment of the Court of Queen's Bench, making absolute a rule to set aside a verdict for the defendants and enter a verdict for the plaintiff, reported in 37 U. C. R. 580. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The following were the appellants' reasons of appeal:—

1. Because the bridge in question is a county bridge, and the liability to repair and maintain the same rests on the county of Perth, and not on the appellants, on these grounds: 1. Because the bridge divides two townships; and 2. Because it is erected over a river crossing a boundary line between the two townships, the appellants herein; and, 3. Because the county has assumed the bridge.

2. As to the first ground, sections 406 and 407 of 36 Vic. ch. 48, O., (the Municipal Institutions Act) do not vest either the jurisdiction over, the possession of, or property in roads dividing townships in the townships; and sec. 409 of the said Act gives a right of action only against the corporation in which the road is vested by the previous.



sections. And the common law liability is in the county as mentioned below.

3. 37 Vic. ch. 16, O., sec. 17, confers the exclusive jurisdiction over such bridges on the county council, whilst section 419 of the Municipal Institutions Act, which is a re-enactment of 12 Vic. ch. 81, sec. 190, transfers all the powers, duties and liabilities of the magistrates in Quarter Sessions, not conferred or imposed on other municipalities in respect of roads and bridges to the county council: *Harrison's Municipal Manual*, 447, note *w*.

4. Sections 414, 415, 416, 417 and 418 of the Municipal Institutions Act do not take away the exclusive jurisdiction of the county council or its property in and possession of the bridge, but compel the townships to do a certain quantity of work on the repair of such bridges, the amount of such work being determined by sections 431, 432, 433, 434, 435, and 436, of the Municipal Institutions Act, and fixed at the quantum of repair on ordinary township roads.

5. The joint jurisdiction of the townships, under section 416, simply extends to the work to be done, and the joint duties and liabilities and rights in respect thereof imposed and conferred; and they have not a general jurisdiction. For instance they cannot close the road; the county council alone can do so: *In re McBride v. Corporation of York*, 31 U. C. R. 355.

6. The words "joint jurisdiction," in section 416 of the Municipal Institutions Act, are not intended to create any new right or power, but simply to extend the joint action of the townships under sections 414 and 415 of the Municipal Institutions Act, to the road or bridge where it so deviates as to be partly or wholly within one township. If the sections of the statute are irreconcilable and the latter section is to be adopted, then the county is liable under 37 Vic. ch. 16, sec. 19.

7. Assuming the county to be liable, either by statute or common law, for the repair of this bridge, a statutory enactment that some other person or corporation is to repair will not remove the liability from the county: 1 Hawk. P.

C. ch. 76, sec. 18; *Rex v. Oxfordshire*, 4 B. & C. 194; *Bussey v. Storey*, 4 B. & Ad. 109; *Rex v. Netherthong*, 2 B. & Ald. 179.

8. The duty to repair the bridge is clearly on the county at common law in England: 2 *Coke's Institutes*, 700, 701. 22 Hen. 8 ch. 5 is declaratory of this common law liability: *Rex v. Inhabitants of Yorkshire*, 2 East 342; *Rex v. Inhabitants of Oxfordshire*, 4 B. & C. 194; *Rex v. Inhabitants of Derbyshire*, 2 Q. B. 745; *Rex v. Inhabitants of New Sarum*, 7 Q. B. 941. This common law liability exists in Ontario: *Corporation of Wellington v. Wilson*, 14 C. P. 299, S. C. 16 C. P. 130; *Harrold v. Corporations of Simcoe and Ontario*, 16 C. P. 43, S. C. on appeal, 18 C. P. 9; *McBride v. Corporation of York*, 31 U. C. R. 355; *Regina v. Corporation of Yorkville*, 22 C. P. 431.

9. This common law liability is not expressly removed by the statute, and therefore remains—*Re Partition between Shaver and Hart*, 31 U. C. R. 609—even though the jurisdiction over the road be vested elsewhere. Cases cited in paragraph 7, and *Rex v. North Riding of Yorkshire*, 2 East 342; *Regina v. Davis*, 35 U. C. R. 107; and the similar conditions of the country and roads in England to those now in Canada, when the common law rule arose, commend it to the Courts in Canada: *Drake v. Wigle*, 24 C. P. 405. If the sections of the statute, as suggested by the Court of Queen's Bench, cannot be reconciled, the common law rule must prevail.

10. Roads dividing townships are the main travelled roads of the county. There is much more travel on them than ordinary township roads. The ordinary quantity of repair bestowed on local roads, would not therefore keep them passable. If the townships are to keep them in a certain state of repair, notwithstanding the much greater wear by travel of the whole county, and the consequent large expense, an unfair burden would be cast upon them: *Rose v. Stormont*, 22 U. C. R. 537.

As to the second ground, namely, that the bridge in question is over a river crossing a boundary line between two townships.

11. 37 Vic. ch. 16, sec. 19, O., provides for the maintenance of bridges over rivers forming or crossing township boundary lines by the county council. Section 17 of the last mentioned Act gives the jurisdiction over bridges crossing streams separating townships to the county council. Clearly, as to the last named class of bridges, the duty to repair is on the county council; for, if not, it is not imposed on any municipality. Stream and river are therefore used synonymously, and no distinction was intended by the Legislature: See also sections 416 and 447 of 36 Vic. ch. 48, O. Size is made no test: See 37 Vic. ch. 16, sec. 19, O.; *O'Connor v. Corporations of Otonabee and Douro*, 35 U. C. R. 73; *Harrison's Municipal Manual*, 417, note N.

12. The only express provision for the repair of such bridges is contained in 37 Vic. ch. 16, sec. 19: *In re Kinnear v. Corporation of Haldimand*, 30 U. C. R., 407.

13. The true test is, whether the structure in question is a bridge or a culvert: *Rex v Whitney*, 3 A. & E. 69. This would be a certain rule; mere width or volume, unless arbitrarily fixed, is an uncertain rule, which in such cases is to be avoided: *Rex v. Inhabitants of Oxfordshire*, 4 B. & C. 194.

14. The evidence shews this water to be a river; the banks are defined, the channel is well marked, the flow of water constant, and the width sufficient. The original bridge was over 200 feet in length. The county council embanked the road and lessened the span of the bridge. Part of the land over which the old bridge was erected was only covered with water in times of freshet, but it was still throughout its length a bridge: *Rex v. Trafford*, 1 B. & Ad. 874; *Regina v. Inhabitants of Derbyshire*, 2 Q. B. 745.

As to the third ground, namely, that the county council has assumed the bridge. This assumption is placed on two grounds. 1. That the county council can assume the bridge without a by-law, and has done so. 2. That if it once assumes the bridge by by-law, it cannot repeal that by-law.

15. The county council can assume without a by-law: *Corporation of Wellington v. Wilson*, 14 C. P. 299, S. C., 16 C. P. 124. The Municipal Act, in section 411, which enables counties to assume roads between townships, makes no mention of a by-law, nor does section 414, whilst sections 410 and 412, providing for the assumption by the county council of roads within minor municipalities, expressly require a by-law. The alternative form of section 411, empowering the council either to assume or make grants, shews a by-law was not contemplated.

16. The county council, on the evidence, has clearly assumed the bridge, if this can be done without by-law.

17. The county council assumed the bridge by by-law No. 8, and cannot repeal it. No power is given to repeal, as in section 410. Such a power would operate unjustly on the townships, since by gravelling, as has been done in this case, a large increase of travel has been brought on the road, and a large number of ratepayers and others have invested their capital in buildings, &c., upon the faith of the road being and remaining a public gravelled road, superior to ordinary roads in townships.

The respondent's reasons against the appeal were:—

1. Because the bridge in question forms part of the road between the townships of Ellice and Downie; they have joint jurisdiction over the same and are bound to keep in \* \* \* repairs: section 416 of the Municipal Institutions Act.

(a.) This joint jurisdiction means that the municipalities are to keep in repair the road or bridge, because we must apply the same rule to each description of municipality mentioned in the section, so that if the road was between two counties or two cities they would be liable: See *Harrold v. Corporation of the County of Simcoe et al.*, 18 C. P. 9.

(b.) The section means more than that the adjoining municipalities must concur in any regulations necessary to be applied to the road or bridge in regard to tolls, &c. See section 418 of the Municipal Institutions Act, where the words duties and liabilities are used, which supports the



view that the townships are liable: *Harrold v. Corporation of Simcoe et al.*, 16 C. P. 43; S. C. in Appeal, 18 C. P. 9; *Corporation of Wellington v. Wilson et al.*, 14 C. P. S. C. 16 C. P. 124; *Hacking v. The Corporation of Perth*, 35 U. C. R. 460; see sections 431 and 432 of the same Act as to enforcing repairs.

(c.) The road is a township boundary line, and section 431 points out how to enforce the repair of such lines not assumed by the county. An application has to be made to enforce joint action; and see section 432 as to enforcing township councils interested to make the repairs. The townships thus have joint jurisdiction, and are bound to repair. It follows that they are to be liable for not repairing.

(d.) The exclusive jurisdiction referred to in section 410 is not inconsistent with this view of section 416 of the Municipal Institutions Act, as the section means that the roads and bridges the words embrace are exclusively under the jurisdiction of the county, and that the local municipality or municipalities are to be excluded from all interference in the exercise of that exclusive power.

2. The jurisdiction over the road and bridge in question, which is between two townships, is not in the county under section 410 of the Municipal Institutions Act.

(a.) Because it is modified by section 416 of the same Act, so that it means any road dividing different townships, shall (when assumed by the county) be under its exclusive jurisdiction. It has not been so assumed by any existing by-law of the county, and is governed by *O'Connor v. The Townships of Otonabee and Douro*, 35 U. C. R. 73.

(b.) The apparent confusion between sections 410 and 416 of the Municipal Institutions Act arises from the change of policy of the Legislature in 1869 in shifting to adjoining townships the responsibility of repairing roads, &c., and in consolidating the Municipal Institutions Act of 1873 omitting to change the wording of the old section 410: section 341 of 29 and 30 Vic. ch. 52; *In re McBride and The Township of York*, 31 U. C. R. 355.

3. Section 413 of the Municipal Institutions Act does not govern the case, as it applies only to bridges over rivers. The bridge in question is over a creek.

(a.) Section 410 contains the words "streams or rivers." There are many bodies of water the word stream would well apply to, to which the word river could not be applied, and to embrace such bodies of water over 100 feet in width was the intention of the Legislature in this section. And the words streams and rivers are not used synonymously.

(b.) The stream of water the bridge in question is over is not a river. See the cases as to what a river is, *Woolrych* on the Law of Waters, 31; *Callis* on Sewers, 4th ed., 77. Lord Tenterden, in *Rex v. Inhabitants of Oxfordshire*, 1 B. & Ad. 301, and other cases cited in the first judgment in this cause, and in the argument for the plaintiff.

(c.) The stream of water is a creek. The general usage of the inhabitants as to the name to some extent governs. Also the name as laid down in maps, as well as the size of the stream. The stream as described is a creek, according to the popular meaning of the term creek in this country and the United States.

(d.) It is more reasonable that the section in question should apply to rivers, because bridges crossing rivers are very expensive, and the county ought to erect such expensive structures.

4. It cannot be held that if counties are by the common law liable to repair bridges, &c., that it governs the present case.

(a.) Because either section 410, or 413, or 416, embraces the present case.

(b.) Because section 409 of the Municipal Institutions Act provides "that every public road \* \* shall be kept in repair by the corporation." It is thus a statutory duty and the common law liability, if any, is excluded by the section.

(c.) The statute points out which roads, &c., particular municipalities are to repair, and it is merely a matter of construction of the sections of the statute.

5. The county council of the county of Perth assumed the road in question by by-law. This by-law was repealed before this action arose, and the jurisdiction returned to the adjoining townships as it was before the county so assumed the road.

The county council cannot set up any Acts indicating an assumption of the road in question, previous to the repeal of the by-law assuming it, and all the acts of control supposed to be exercised by the county council or its officers do not in law amount to an assumption of the road.

The case was argued on the 16th March, 1877 (a).

*Robert Smith*, for the appellants.

*Charles S. Jones*, for the respondents.

The arguments and cases cited fully appear in the reasons for and against the appeal.

June 27, 1877 (a). HAGARTY, C. J. C. P.—We cannot feel any surprise at the difference of opinions bearing on this case in consequence of the very curious uncertainty of the several clauses in the Municipal Act.

But it seems to me that if the flow of water comes within the term "river," "forming or crossing a boundary line between two municipalities," the duty of maintaining the bridge in question devolves on the county.

The county engineer (page 23) says: "The river, namely the Black Creek, gets much wider in the 5th concession of Fullarton, that is about 5 miles south-west of Sebringville; it also gets very deep with a high bluff, and perpendicular sometimes on one side, sometimes on the other; the average depth in not high water, nor yet in low water, perhaps 6 feet.

A large body of water falls into the Thames by this creek; for 2 or 3 miles below Sebringville its bed is stone and gravel; then it begins to get deeper and gets into clay

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*Present.*—HAGARTY, C. J. C. P., BURTON, PATTERSON, and MOSS, JJ. A.

*Present.*—HAGARTY, C. J. C. P., BURTON, PATTERSON, and MOSS, JJ. A.

bottom; about  $\frac{1}{4}$  mile above the junction with the Thames it gets rapid, running over a gravel bed, and where it joins the Thames it has a clay bottom like the Thames itself."

\* \* The banks of the Black Creek below the pond are well defined. No flood could bring water down that would cause an overflow of the lands. I think a proper bridge at Sebringville should be of a span of 60 feet.

The words "stream" and "river" seem to be used in our statutes as apparently synonymous terms.

The Dominion Act, 36 Vic. ch. 65, is "for the better protection of navigable streams and rivers."

Ch. 47, Consol. Stat. U. C., respecting "rivers and streams," regulates the felling of timber into the Grand River, River Thames, River Nith, River Speed, Otter Creek, River Credit, River Otonabee, River Scugog, River Trent, Crow River, Rivers Gananoque, Rideau, Petite Nation, Tay, Mississippi, Bonnechere, Madawaska, and Goodwood. \* \* It then speaks of the waters of the said rivers or creeks.

Section 2 speaks of "any river, rivulet, or water course" in Upper Canada, except those mentioned; and section 3 speaks of "any tree cut down, or felled across any such river, rivulet or water course, for the purpose of being used as a bridge "across any such river, rivulet, or water course."

Section 4: "This Act shall not extend \* \* to any river or rivulet wherein salmon, pickerel, black bass, or perch do not abound."

Ch. 48, Consol. Stat. U. C., speaks of "any stream down which lumber is usually brought;" and section 4: "streams or rivers whereon such dams are erected."

Ch. 68, Consol. Stat. C., as to joint stock companies for transmitting lumber, speaks of "any river or stream."

We thus find our Legislature evidently applying the term "river" to very humble streams, many of them probably as undeserving of the name as the Black Creek.

We also find the term used in a high and large sense: "Navigable streams and rivers."

Turning to our own Municipal Act, we find section 410



giving the county exclusive jurisdiction over "bridges across streams separating two townships in the county."

Then we find section 413 directing counties to "erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities."

There can be no especial or legal meaning in the word "river" in the manner we find it used by our Legislature. The Credit and the Humber in their windings through the country never lose that name, even where dwindling to much smaller dimensions than this Black "Creek," or numerous other "creeks."

It seems to me that this Black Creek is a river within the meaning of this section, and, therefore, that the county council, and not these defendants, are liable.

BURTON, J. A.—It appears difficult to reconcile the language used in section 410 of the Municipal Act of 1873, with section 416 of the same enactment, by the former of which exclusive jurisdiction is given to the county councils over every road or bridge dividing different townships, although such road or bridge may so deviate as in some places to be wholly or in part within one township, whereas the latter section provides that in case a road lies wholly or partly between two townships, the councils of the municipalities between which it lies shall have joint jurisdiction over the same.

Whatever, however, may be the meaning intended to be given to the words "exclusive jurisdiction," it was manifestly not the intention to cast the burden of making and maintaining these roads upon the county unless it assumed them, which it had power to do under the 411th section, but to leave the townships bordering on the same liable to keep the boundary lines in repair.

The road, upon which the bridge referred to in the pleadings was situate, was between the two townships of Ellice and Downie, and had at one time been assumed as a county road, but the by-law so assuming it had been repealed before the occurrence of the accident of which

the plaintiff complains; but it appears to me, without attempting to reconcile the apparently inconsistent language of the two sections to which I have alluded, that the liability to maintain the bridge was with the county council.

The 416th section, it is true, expressly refers to bridges on such line of road as being part of the road, and that section, in connection with other portions of the Act, I should have considered conclusive as establishing the liability of the adjoining townships, if there had been no conflicting intention to be gathered from the Act; but the 413th section expressly casts the duty of erecting and maintaining a certain class of bridges, viz., bridges over rivers forming or crossing boundary lines between two townships, upon the county council, and the rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception: *Churchill v. Crease*, 5 Bing. 180.

The 416th section may therefore be read thus: "That the councils of the two townships between which the road lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road, except a bridge over a river crossing the same, which shall be erected and maintained by the county council.

But adopting the rule of construction referred to by the learned Chief Justice of the Queen's Bench, that if two sections are inconsistent the earlier is to give way to the later, it must be borne in mind that section 413 was re-enacted nearly in the same terms as originally found in the Act of 1873 in the subsequent year, by 37 Vic. ch. 17, sec. 19, and must be regarded as the more recent expression of the intention of the Legislature.

I concur with the view expressed by Mr. Justice Gwynne, that the Legislature contemplated no difference between the expressions streams and rivers, as used in these sections.

In section 410, as amended by the Act of 1874, the terms used are "over all bridges across *streams* separating two

townships in the county, and over all bridges crossing streams or rivers over 100 feet in width, within the limits of any incorporated village," whilst the 413th section, as amended by that Act, enacts that "It shall be the duty of the county councils to erect and maintain bridges over *rivers*, forming or crossing boundary lines." And in section 412 of the same Act the county councils are required to build and maintain all bridges on any river or stream over 100 feet in width within an incorporated village.

It is manifest then that had this stream instead of crossing the boundary in fact *formed the boundary* between Ellice and Downie, the bridge would have fallen within the definition of the structure which the county is bound to build; to adopt a different construction when the bridge is rendered necessary in consequence of the stream *crossing the boundary* would be a distinction and a refining of language which certainly could never have been contemplated by the Legislature, and would scarcely be entertained in a Court of justice.

I think, therefore, that this bridge was not only under the jurisdiction of the county council, but that that body is bound by the express terms of the statute to keep it in repair, and that the verdict therefore should have been rendered for the defendant.

I have been unable to discover that any such change of policy was adopted in 1869 as is indicated by the learned Chief Justice, and have been unable, therefore, to trace the apparent discrepancy in the language of the sections which we have had to consider to the cause he mentions. It does not appear to me to be material to the decision of this case, but the Legislature will probably make such amendments as will bring the two sections into harmony with each other and prevent any future difficulty.

I am of opinion that the appeal should be allowed, with costs, and the rule to set aside the verdict discharged.

PATTERSON, J. A.—This action is for damages sustained by the plaintiff when travelling along the township line

between the defendant townships, by reason of a bridge over the Black Creek, where that stream crosses the township line, being out of repair.

The question is, whether the townships are liable to maintain the bridge, or whether the county alone is liable.

There are two groups of clauses in the municipal law (36 Vic. ch. 48, amended by 37 Vic. ch. 16) upon the construction of which the solution of the question depends.

Sections 414, 416, and 431, seem to impose the duty on the townships.

Section 414 enacts that "All township boundary lines not assumed by the county council shall be opened, maintained, and improved by the township councils."

By section 416, in case a road lies between, *inter alia*, a township and an adjoining township, the councils of the municipalities between which the road lies shall have joint jurisdiction over it, and the road shall include a bridge forming part of the road.

And section 431 provides for the county council enforcing joint action by the townships whenever the township councils fail to maintain township boundary lines not assumed by the county council, in the same way as other township roads, by mutual agreement.

The sections relied on as casting the duty upon the county are 410 and 413.

Section 410 gives the county council exclusive jurisdiction over every road or bridge dividing different townships.

And section 413 declares that "it shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities."

The case was twice tried before Mr. Justice Gwynne, who at the first trial nonsuited the plaintiff, and at the second entered a verdict for the defendants, subject to the opinion of the Court of Queen's Bench, holding that the duty to maintain the bridge was upon the county and not upon the townships.

The Court of Queen's Bench took a different view of



the law, and granted a new trial after the nonsuit; and, by the judgment which is now appealed from, set aside the verdict for the defendants, and entered a verdict for the plaintiff.

The judgment on both occasions was delivered by the learned Chief Justice, and rests, as I understand it, upon the following grounds:—

1. In *O'Connor v. The Township of Otonabee*, 35 U. C. R. 73, the Court had held, in order to give effect to both of the apparently inconsistent sections 410 and 416, that reading them with the assistance of section 431, the effect was that the exclusive jurisdiction of the county over roads between townships was confined to such roads as the county had assumed; and that the township had joint jurisdiction, with the concomitant liability, in respect of such roads as were not assumed by the county. That decision was followed in this case.

2. In *O'Connor's Case* no question arose on section 413; and the view now taken of that section and of section 416 is, that the latter may be taken to declare that the road shall include a bridge forming part of the road, for the purposes of the section, except, as provided in section 413, when the bridge crosses a river. And the Chief Justice concludes that Black Creek is not a river, and that therefore in this case section 413 does not interfere with the full effect of section 416.

3. That if sections 410 and 416 are mutually destructive, the earlier gives way to the later, which is taken as a rule to speak the latest intention; and that on this ground section 416 should prevail.

It is remarkable that there should be room for a question such as that before us: that under a statute intended for the guidance of the yeomen of the province in the management of their municipal affairs, there should be any doubt as to whose duty it is to maintain a bridge on a township line. It is to be hoped that the Legislature may restore the law to the certainty which it possessed under the original Act of 1849 and the succeeding one of 18 8, under which the liability

of the county was unquestionable : 12 Vic. ch. 81, secs. 37 and 38 ; 22 Vic. ch. 99, secs 314 and 325.

The confusion was introduced in 1866 by the introduction into section 329 of the Municipal Act of that year, 29 and 30 Vic. ch. 51, of the words " township and incorporated village," the section in other respects following section 314 of the Act of 1858, and becoming (with a trifling amendment made in 1869 by 33 Vic. ch. 26, sec. 8), the same as section 416 of the Act of 1873; and by the addition to section 341 (which followed section 325 of the Act of 1858, and was essentially the same as the present section 410) of a dozen sub-sections, of which 1 and 2 were equivalent to sections 414 and 431 of the Act of 1873 ; No. 11, like the present section 411, enabled counties to assume township lines ; and No. 12 made it the duty of county councils to erect and maintain bridges over rivers forming township or county boundary lines. This, with an amendment unimportant to our present purpose, which was made in 1871 by 34 Vic. ch. 30, sec. 13, resembled section 413 of the present Act, except that the latter extends to bridges over rivers *crossing* boundary lines of townships or counties as well as to those *forming* such boundaries.

I think that the law as applicable to the case before us can be interpreted on an intelligible principle of construction; but while the principle may not be disputed, there is no certainty that in applying it different minds will arrive at the same conclusion.

I agree with Mr. Justice Gwynne in his view of the law; but I believe that I differ from the Court of Queen's Bench only in the application to the facts of this case of the principles laid down by the learned Chief Justice.

If sections 410 and 416 cannot be worked together, 410 must prevail; because that section, as also section 413, owes its present existence to the Act of 1874, (37 Vic. ch. 16, secs. 17 & 19), and therefore is the later indication of the legislative will—a circumstance which seems to have escaped attention in the Court below.

I do not wish, however, to rest my judgment upon sec-

tion 410. I am not prepared to hold that if section 413 were absent, the effect of the statute would be to free the townships. I think the case of *O'Connor v. Otonabee*, 35 U. C. R., p. 73, was properly decided. The reasoning upon which the effect of sections 410, 414, 416, and 421, of the Act of 1873 was held to throw upon the adjoining townships the duty of maintaining the road between them when the county had not, under section 411, assumed the road, is aided by the circumstance that in the Act of 1866 the originals of all those sections (except section 416) form one section with its sub-sections.

I agree with the learned Chief Justice that section 413 is unimpaired in its effect by any conflict which exists between sections 410 and 416. The particular words, viz., "*rivers crossing the boundaries*," on which the liability of the county in the present case turns, were first introduced into the section in 1873; and further, the section was reenacted in 1874, and, therefore, cannot be controlled by any inconsistent enactments in the Act of 1873.

Whatever doubt may at any time have existed as to the roads between townships in general, the clear effect of section 413 is, that the bridges crossing rivers upon those boundaries have to be built and maintained by the county.

The only question can be: Is this a bridge over a river?

We must give the Legislature credit for having in view something more practical than to leave an important duty like the building of a bridge to fall on one municipality or another, or to be bandied from one to another, as opinions happen to vary in according or denying to the particular stream the dignity of a river. The word "river" is used for another purpose than merely designating a stream which has a certain minimum volume of water, or height of bank, or width of bed.

A direction to build and maintain all necessary bridges would have been too vague. It would have left room for the contention that whenever the convenience of travel required a bridge over a ravine or a railway, or even a corduroy causeway through a swamp, the county must

make one. This vagueness is avoided by confining the duty to bridges over rivers. It is in this sense and for this purpose that, in my opinion, the word rivers is used. I think the duty, while confined to what is not improperly called a river, attaches wherever the road is crossed by a stream which requires a bridge, as distinguished from a mere culvert, in order to make the road fit for ordinary travel.

There can be no question that the structure with a span of fifty feet, shewn to us by the photographs and described by the evidence, is a bridge, and that the Black Creek is a stream which requires a bridge to carry the road across it. I think it is clear that it is a bridge over a river within the meaning and intention of the statute.

It may not be out of place to repeat my hope that the Legislature may soon remove the ambiguities and uncertainties which interfere so much with the usefulness of the statute. The decisions of the Court of Queen's Bench in this case and in *O'Connor's Case*, holding that the county must make and maintain bridges over rivers which cross the boundary lines of townships; but that unless the county assumes the road, the townships are responsible for its maintenance in all other respects, put, in my judgment, the only construction which can fairly be put upon the statute in its present form, so as to give effect to all its parts.

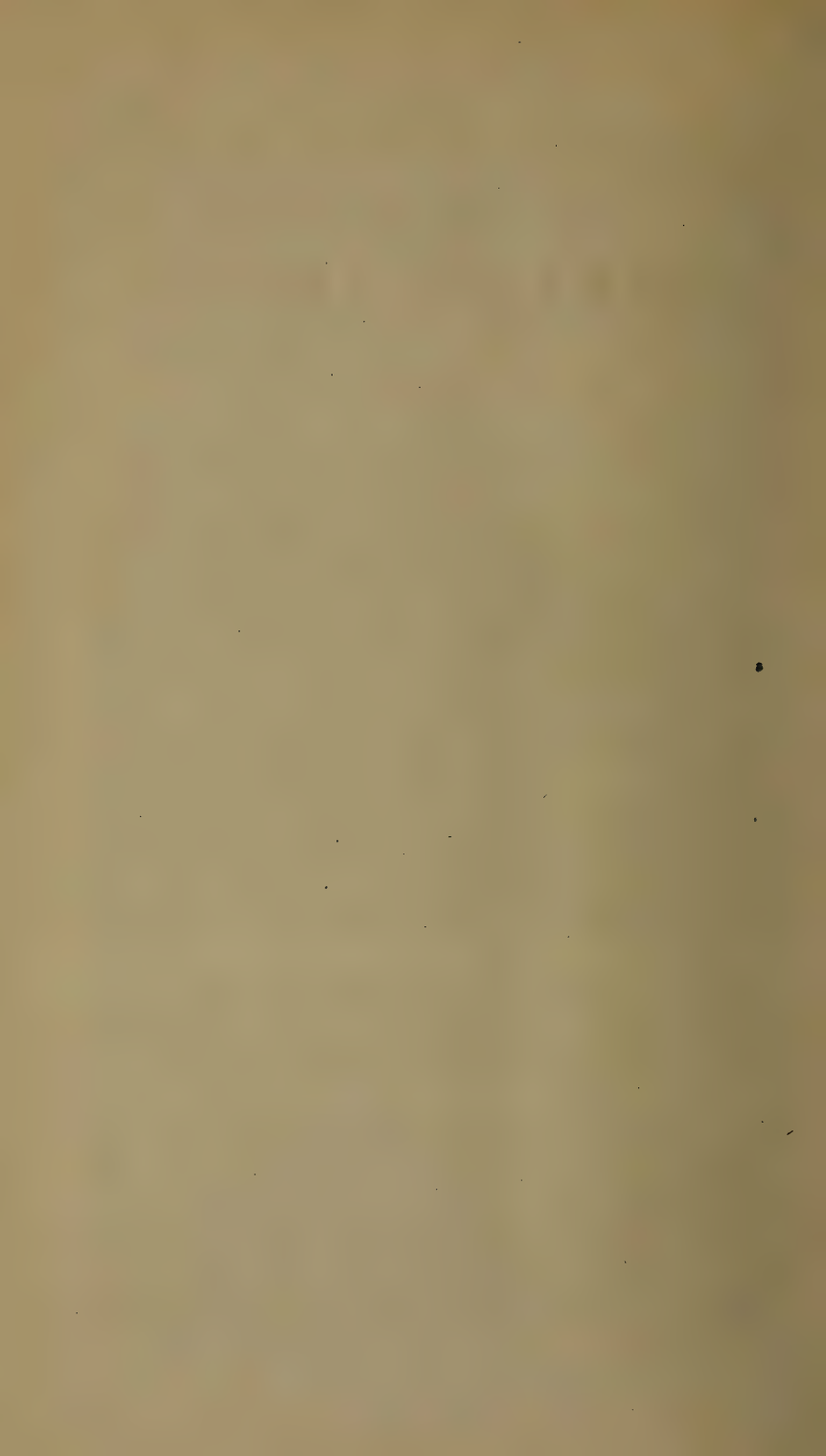
It is unfortunate that the inconsistencies of the Act have occasioned so much litigation; and it is apparent that room is left for plenty of litigation still. In the present case, the accident happened from the bad state of what clearly was part of the bridge. But when a similar accident happens on the debatable land between the road and the bridge, which is called the approach to the bridge, whether an embankment, a cutting, or a mere narrowing of the road, we may look for fresh appeals to the Courts to determine in each case whether the place is road or bridge. A state of things so complicated and uncertain should not be allowed to continue.



On the ground that the stream in question is a river within the meaning of sec. 413, I think the appeal should be allowed with costs, and a verdict entered for defendants.

Moss, J. A., concurred.

*Appeal allowed.*



The following rules were read in Court, on the 30th March, 1878:—

IN THE  
COURT OF APPEAL.

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GENERAL ORDERS.

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30TH DAY OF MARCH, 1878.

I. Upon from and after this date, all Rules and Orders heretofore made, and now in force regulating the practice and proceedings in civil causes in this Court are annulled, except the Rules now in force respecting appeals to Her Majesty in Privy Council ; and the following Orders made under the authority of the Court of Appeal Act are substituted for the same.

II. Unless otherwise specially ordered by the Court appealed from, or a Judge thereof, the security required by sections 26 and 27 of the said Act shall be personal and by bond, and may be in the form given in the Appendix, *mutatis mutandis*. (Form A.) : Provided that in any case in which execution may be stayed on the giving of security under Section 27, such security may be given by the same instrument whereby the security prescribed in Section 26 is given.

III. The bond shall be executed by the appellant or or appellants, or one or more of them, and by two sufficient sureties, unless such Court or Judge shall think fit to dispense with the execution thereof by the appellant.

IV. When the judgment appealed from directs the payment of money, the security required by section 27, subsection 4, shall be in double the amount so directed to be paid ; provided always that, in cases where the security to be given shall be in a sum above two thousand dollars, it shall be in the discretion of the Court appealed from, or of a Judge thereof, to allow security to be given by a larger number of sureties, apportioning the amount among them as shall appear reasonable ; and provided further, that,

where the amount by the judgment directed to be paid exceeds \$10,000, it shall be in the discretion of such Court or Judge to allow security to be given for such amount less than double as shall appear reasonable.

V. When the judgment appealed from directs the sale or delivery of possession of real property or chattels real, the security required by section 27, sub-section 3, shall be taken in double the yearly value of the property in question, unless the Court appealed from or a Judge thereof shall otherwise direct.

VI. The parties to every such bond as sureties shall by affidavit respectively make oath that they are resident householders or freeholders in Ontario, and severally worth the sum mentioned in such bond, over and above what will pay and satisfy all their debts ; and such affidavit may be in the form given in the Appendix. (Form B.)

VII. The bond with an affidavit of the due execution thereof, and affidavit of justification, shall be deposited with the Clerk or Registrar of the Court appealed from in Toronto, and shall be deemed to be perfected and allowed, unless, within fourteen days after being served with notice thereof, the respondent shall move for its disallowance.

VIII. The appellant may, after such deposit, make a special application before the expiration of fourteen days to stay execution in any of the cases mentioned in section 27 of the said Act.

IX. After the security has been perfected, the appellant shall prepare a draft of the case mentioned in the 31st section of the said Act, and shall submit such draft to the respondent, who shall return the same within four days, with his modifications or suggestions, and in the event of difference the appellant shall give two days' notice of an application to the Court or Judge to settle the case, in pursuance of the said section ; and if, in the opinion of the Court or Judge, such application was caused by the unreasonable conduct of either party, such party may be ordered to pay the costs thereof.

X. Where the case has been settled by the parties themselves no costs shall be taxed, either between party and party, or Solicitor or Attorney and client, for any matter stated in the case which was not reasonably necessary to raise the question in appeal.



XI. The appellant shall serve his reasons of appeal along with and as part of the draft case mentioned in the 9th order, and the respondent shall serve his reasons against the appeal within ten days from such service, or within such further time as a Judge of the Court of Appeal may allow.

XII. If the appeal is from a part only of the judgment, the reasons of appeal shall specify the part.

XIII. If the respondent shall neglect to serve reasons against the appeal, the Court may hear the appeal *ex-parte*, and give judgment thereon without the intervention of the respondent.

XIV. Upon being served with the respondent's reasons against the appeal, or upon his having made default in service thereof, the appellant shall cause appeal books to be printed, containing the case as settled by the parties or the Judge, and the reasons for the appeal, and the reasons against the appeal, if such latter reasons have been served as aforesaid, and any notice given under the 16th of these orders, and forthwith deliver one of such copies to the Registrar, by whom the same shall be filed as the stated and settled case, and ten copies for the use of the Judges and Officers of the Court.

XV. The respondent may, after such printed book has been delivered to the Registrar, apply to a Judge of the Court of Appeal for leave to serve his reasons, upon affidavit accounting for the delay, and such leave may be given upon such terms as the Judge may think proper.

XVI. A cross appeal shall not under any circumstances be necessary, but if a respondent intends upon the hearing to contend that the decision should be varied, he shall with his reasons against the appeal give notice of such contention to any parties who may be affected by such contention, and such notice shall concisely state the grounds of such contention in the same manner as reasons of appeal are stated. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may in the discretion of the Court be ground for an adjournment of the appeal or for a special order as to costs.

XVII. The reasons for and against the appeal shall contain a statement of the points of law intended to be argued, and the authorities relied upon.

XVIII. The appeal books shall be printed on paper of good quality, on one side of the paper only, and in demy quarto form with pica type leaded, or small pica type leaded, and every tenth line of each page shall be numbered in the margin. An index to the pleadings, evidence, and other principal matters shall be added ; but the opinions of the Judges of the Court appealed from shall not be printed where the same have been already issued in the regular reports, but a reference to the same shall be given in the appeal books, and shall be sufficient. The style of the cause in the Court below shall be used and retained in the appeal book and in every proceeding in this Court, the designation "appellant" or "respondent" being added, *e.g.*:

BETWEEN A. B., (*respondent*),

PLAINTIFF

AND

C. D., (*appellant*),

DEFENDANT.

XIX. The Registrar shall not file the case without the leave of a Judge, if the preceding order has not been complied with.

XX. If the press has not been carefully corrected the Court may disallow the costs of printing, or may decline to hear the appeal, and make such order as to postponement and payment of costs as may seem just.

XXI. The printed case and the copies thereof for the use of the Court shall be delivered to the Registrar within thirty days after the allowance of the security, unless the time shall be extended by the Court of Appeal or a Judge ; and in case of neglect or omission by the appellant to comply with this rule the respondent may apply to a Judge, upon two days' notice to the appellant, for an order dismissing the appeal as for want of prosecution, and the Judge may thereupon make such order as to dismissing the appeal or otherwise as may appear just.

XXII. Appeals shall be entered by the Registrar upon the list for hearing at the next regular sittings of the Court which shall commence at least eight days after the receipt by him of the printed copies ; and the appellant shall serve the respondent or such respondents as are directly affected

by the appeal with notice of hearing at least seven days before the first day of such sittings ; and he shall at the same time deliver to the respondent two printed books.

XXIII. If in the opinion of the Court any parties not served ought to be notified, the Court may direct service to be made, and may postpone the hearing of the appeal for that purpose upon such terms as may seem just.

XXIV. If either party neglect to appear at the proper day to support or resist the appeal, the Court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon payment of such costs as the Court shall direct.

XXV. Interlocutory applications to the Court or a Judge shall be made by notice of motion, supported by affidavit to be filed in the office of the Registrar before the notice of motion is served.

XXVI. The notice of motion, together with copies of the affidavits filed, shall be served at least two clear days before the time of hearing ; and in the computation of such two clear days, Sunday or any day on which the offices are closed is not to be reckoned.

XXVII. Admissions of the service of a notice of motion upon the opposite Attorney or Solicitor need not be verified by affidavit; and in no case shall an affidavit of service be allowed upon taxation unless it shall appear that the party served shall, after a demand therefor, have refused to give an admission of such service.

XXVIII. The same fees and allowances shall be taxed in appeal by the Registrar, as are allowed for similar services in the Court from which the appeal is brought ; and a reasonable sum, not exceeding \$5 in any case, may be allowed for correspondence during the progress of the appeal.

XXIX. In ordinary cases the Registrar shall not tax larger Counsel fees than \$40 to the senior Counsel, and \$20 to the junior Counsel ; and in no case more than \$80 to the senior and \$50 to the junior Counsel.

XXX. The Registrar shall not tax two counsel fees, except in cases of such difficulty or importance as to render the appearance of two counsel reasonably necessary and proper.

XXXI. Two clear days' notice shall be given to the unsuccessful party or parties of the time appointed by the Registrar for the settlement of the certificate provided for by the 44th Section of the Court of Appeal Act and the taxation of costs.

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## INSOLVENCY APPEALS.

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XXXII. A Judge of the Court will sit on every Tuesday, except during Vacation and the sittings of the Full Court, to hear appeals under the Insolvency Act.

XXXIII. The party desiring to appeal shall, within the eight days limited by the Act, serve a notice upon the parties who may be affected by the result of the appeal, stating his intention to appeal, and upon giving such notice he shall be deemed to have adopted proceedings on the appeal in compliance with the Act.

XXXIV. The appellant shall within seven days from making the deposit or giving the security required by the 128th Section of the Insolvency Act, set down the matter to be heard, by filing with the Registrar a præcipe for the hearing thereof on the next Tuesday on which a Judge shall sit under the preceding Order, being not less than seven days thereafter; and shall serve not less than seven days' notice upon the opposite party, stating the time for which the appeal has been entered to be heard, (adding "or as soon after as Counsel can be heard") together with the grounds of objection on which the appellant relies, as nearly as may be in the manner in which reasons of appeal are drawn in appeals brought up from the Superior Courts.

XXXV. It shall not be necessary to serve any petition or any other notice than those hereinbefore provided.

XXXVI. The clerk or assignee or other officer having the custody of the documents, papers, and proceedings, shall, upon the request of any party interested in the appeal, and upon receiving a sufficient sum to defray postage, transmit the same to the Registrar for the use of the Court, and it shall not be necessary to prepare



any case when the appeal is to be heard by a single Judge, but the appellant shall, when setting the appeal down to be heard, leave a copy of the notice of hearing with the Registrar, to be delivered to the Judge.

XXXVII. After the appeal has been disposed of, the Registrar shall, at the request of any person interested, and upon receiving a sufficient sum to pay postage, return such papers to the officer from whom the same were received.

XXXVIII. If the necessary papers have not been received by the Registrar on or before the Friday preceding the day named for the hearing, the appeal shall not be heard unless the Judge otherwise orders.

XXXIX. The costs and fees mentioned in Form D, in the Appendix, and no other or greater shall be allowed on taxation or taken or received by any Solicitor, Attorney, Sheriff, or Officer respectively, for any service rendered under the Insolvent Act ; and the same shall be the costs, fees, and charges fixed and settled under and in pursuance of the 123rd Section of the said Act.

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## COUNTY COURT APPEALS.

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XL. An appeal shall be set down to be heard at the first sittings of the Court for the hearing of arguments, which shall commence after the expiration of thirty days from the decision complained of.

XLI. An appeal shall be set down for hearing by delivering to the Registrar of the Court of Appeal, at least eight days before the sittings at which the appeal is to be heard, the certified copy of the pleadings, proceedings, evidence and other matters required by section 41 of chapter 43 of the Revised Statutes of Ontario, and ten appeal books for the use of the Judges of the Court of Appeal and the Officers of the Court.

XLII. The books shall be printed on paper of good quality, on one side of the paper only, in demy quarto form, with small pica type leaded, and every tenth line of each page shall be numbered in the margin, and a statement of the reasons of appeal shall form a part thereof.

XLIII. A full copy of the pleadings shall not be printed in the books, unless it be necessary for the proper consideration of the question raised upon the appeal, *ex. gr.* in questions arising on demurrer, or in arrest of judgment, or for judgment *non obstante veredicto*. In other cases it shall be sufficient to state the substance of the pleadings, in a brief form, in accordance with the example given in the appendix, but so as to be intelligible. (Form C.)

XLIV. It shall not be necessary to print evidence which does not bear upon the question in appeal, but the books must always contain the opinion delivered by the Judge in Term, and his charge in case of a trial by a jury, and his note of judgment in case of a trial by himself.

XLV. Exhibits used at the trial shall not be printed in the books, unless their contents are material to the question in appeal, and then only such parts as are material ; if any instrument or document be unnecessarily printed the expense thereof shall be disallowed on taxation.

XLVI. All formal matters, such as copies of the motion papers and rules discharging or making rules nisi absolute, shall be omitted, but such reference shall be made to them, including the dates thereof, as may appear necessary for giving a clear and intelligible statement of the case.

XLVII. No costs shall be taxed, whether between party and party or between attorney and client, for any matter appearing in the appeal books which was not reasonably necessary to raise the question in appeal.

XLVIII. The appellant shall, at least six days before the sittings at which the appeal is to be heard, serve the respondent with notice of the setting down of the appeal, and with a copy of the printed appeal book, and of the grounds and reasons of his appeal. In case the respondent is of opinion that any necessary matter has been omitted, he may at any time before the hearing leave with the Registrar a memorandum briefly referring to such omitted matter.

XLIX. Service of all necessary notices may be made either upon the Attorney or upon his Town Agent, in the same manner as if the suit were in one of the Superior Courts.

L. If the foregoing rules are not complied with, the appeal shall not be heard, unless the Court or a Judge shall, on application made upon two days' notice to the respondent, otherwise order.

LI. The costs to be taxed and allowed upon appeals from County Courts shall be on the same scale as formerly allowed upon appeals to the Courts of Queen's Bench or Common Pleas : and a sum not exceeding in any case \$2.00, may be allowed for correspondence during the progress of the appeal.

LII. All books, as well in Superior Court as County Court appeals, shall contain the date of the first proceeding in the suit or matter ; and the dates of the filing of the several pleadings shall be stated at the commencement of the copy or summary thereof. In the event of non-compliance with this rule, such books will not be received by the Registrar, nor will the appeal be heard.

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### SITTINGS, VACATION, COMPUTATION OF TIME, &c.

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LIII. There shall be five sittings in the year for hearing arguments, commencing on the second Tuesday in January, the first Tuesday in March, the second Tuesday in May, the first Tuesday in September, and the second Tuesday in November, or in case any of these days shall be a legal holiday, then on the following day.

LIV. In case of sittings at any other time being deemed necessary or convenient for the despatch of business, due notice of the time of holding the same will be given.

LV. There shall be two vacations, namely : the long vacation, commencing on the first day of July and terminating on the 31st day of August, and the Christmas vacation, commencing on the 24th day of December and terminating on the 2nd day of January, following.

LVI. The days of the commencement and termination of each vacation shall be included in and reckoned part of the vacation.

LVII. The time of either vacation shall not be reckoned in the computation of the time appointed or allowed by these Orders for any act or proceeding, except in the case of County Court appeals.

LVIII. The Court or a Judge shall have power to enlarge or abridge the time appointed by these Orders for doing any act or taking any proceeding upon special application, and upon such terms as the justice of the case may require.

LIX. In all cases in which any particular number of days, not stated to be clear days, is prescribed by these Orders, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless such last day shall happen to fall on Sunday, or a legal holiday, or non-judicial day.

LX. In all cases expressed to be clear days, or where the term "at least" is added, both days shall be excluded.

LXI. In all matters relating to services of notices, not specially provided for by these Orders, the practice of the Court appealed from shall be followed.

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## PAYMENT OF MONEY INTO AND OUT OF COURT.

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LXII. Money ordered to be paid into Court is to be deposited in the Canadian Bank of Commerce at Toronto, with the privity of the Registrar, and to the credit of the cause or matter.

LXIII. Any person desiring to pay money into Court must file a written request with the Registrar for a direction, which the Registrar shall give, stating the style of the cause or matter and the amount to be paid in.



LXIV. The person so paying in shall obtain a duplicate receipt therefor, one copy of which shall be filed with the Registrar.

LXV. No money is to be paid out of Court except upon an order of the Court or a Judge, obtained upon notice to the opposite party.

LXVI. Money is only to be paid out of Court upon the cheque of the Registrar, countersigned by a Judge.

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## APPENDIX.

## FORM A.

KNOW ALL MEN BY THESE PRESENTS, that we (naming all the obligors with their places of residence and additions), are jointly and severally held and firmly bound unto (naming the obligees with their places of residence and additions), in the penal sum of \_\_\_\_\_ dollars, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors and administrators, respectively, firmly by these presents.

Dated this

day of

Whereas the (appellant) complains that, in the giving of a certain judgment in a certain suit in Her Majesty's Court of Queen's Bench (or of *Chancery* or *Common Pleas*, as the case may be), in the Province of Ontario, between (naming the parties to the cause) \_\_\_\_\_, manifest error hath intervened; wherefore (the appellant) desires to appeal from the said judgment to the Court of Appeal.

Now the condition of this obligation is such, that if (the appellant) do and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise to remain in full force.

Signed, sealed and delivered,  
in the presence of \_\_\_\_\_

## FORM B.

*In the (style of Court).*

A. B., plaintiff,	}	I, E. F., of _____, make oath
vs.		and say, that I am a resident inhabitant of
C. D., defendant.	}	Ontario, and am a householder in _____, (or
a freeholder in _____,)		and that I am worth the sum of _____

(the sum mentioned as the penalty, or such sum as the deponent

is bound in), over and above what will pay all my debts. And I, J. H., of \_\_\_\_\_, make oath and say, that I am a resident inhabitant of Ontario, and am a householder in \_\_\_\_\_, (or a freeholder in \_\_\_\_\_,) and that I am worth the sum (as in the former case) of \_\_\_\_\_ over and above what will pay all my debts.

The above-named deponents, E. F. and G. H., were sworn at, &c., the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, before me,

Commissioner, &c.

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FORM C.

Action commenced by Writ dated 2nd January, 1878.

Declaration : *Filed 16th January, 1878.*

1st Count.—Trespass to goods.

2nd “ —Common Counts.

Pleas : *Filed 24th January, 1878.*

To 1st Count.

1. Not guilty.

2. Not possessed.

3. Leave and license.

To 2nd Count : *Nunquam indebitatus.*

(Replication and other pleadings to be in a similar form, but sufficiently full to be intelligible.)

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FORM D.

TARIFF.

*Fees to Solicitor or Attorney, as between party and party, and also as between Solicitor and Client.*

Instructions for demand of assignment by debtor, or for compulsory liquidation, or for petition, where the Statute expressly requires a petition, or for brief, where matter is required to be argued by counsel, or is authorized by the Judge to be argued by counsel, or proceedings on appeal.. ..... \$2 00  
Instructions for other necessary proceedings..... 1 00

Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, pleadings, and all other necessary documents or papers, when not otherwise expressly provided for, per folio of 100 words, or under.....	\$0 20
Making other copies when required.....	0 10
(When more than <i>five</i> copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies.	
Drawing schedule, list or notice of liabilities, per folio, when the number of creditors does not exceed twenty	0 20
When the number of creditors therein exceeds twenty, then for every folio of 100 words over twenty.....	0 10
Every common affidavit of service of papers, including attendance.....	0 50
Every common attendance.....	0 50
Every special attendance on judge, or before assignee or at meetings of creditors.....	2 00
For every hour after the first .....	1 00
(To be increased by the Judge in his discretion.)	
Fee for settling special composition deed, or consent to discharge.....	2 00
Fee on writ of attachment against estate and effects of insolvent, including attendance.....	2 00
Fee on rule of Court or special order of Judge (whether <i>nisi</i> or absolute) .....	1 00
Fee on <i>sub. ad test.</i> , including attendances .....	1 00
Fee on <i>sub. duces tecum</i> , including attendance .....	1 25
And if above four folios, then for each additional folio, over such four folios .....	0 10
Fee on every other writ.....	1 00
Every necessary letter .....	0 50
Costs of preparing claim of creditors, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary case, where no dispute .....	1 00
Preparing for publication advertisements required by the Statute, including copies and all attendances in relation thereto.....	2 00
Preparing, engrossing, and procuring execution of bonds or other instruments of security .....	2 00
Actual travelling expenses, not exceeding in any case ten cents per mile actually travelled .....	
Actual disbursements for postages and other necessary expenses .....	
Bill of costs ; engrossing, including copy for taxation, per folio .....	0 20



Copy for the opposite party .....	0 50
Taxation of costs .....	1 00

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind.

#### COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and affixed by the judge as shall appear to him proper under the circumstances of the case.

#### FEEES TO CLERK.

Every writ, or rule, or order.....	0 50
Filing every affidavit or proceeding .....	0 10
Swearing affidavit .....	0 20
Copies of all proceedings of which copy bespoken or required, per folio of 100 words .....	0 10
Every certificate.....	0 50
Taxing costs .....	0 80
Fee for keeping record of proceedings in each case .....	1 00
Any search .....	0 10
A general search relating to one insolvency, or the insolvency of one person or firm .....	0 50
For every hearing in any case on applications for discharge, contestations or other special hearings, where the attendance of the Clerk is deemed necessary by the Judge, per hour .....	0 50

#### SHERIFF.

Same as on corresponding proceedings in Superior Courts.

#### WITNESSES.

Same as in Superior Courts.

In case of any proceedings not provided for by this tariff, the charges to be the same as for like proceedings, according to the tariffs of the Superior Courts.

THOMAS MOSS, *C. J. A.*  
 GEO. W. BURTON, *J. A.*  
 C. S. PATTERSON, *J. A.*  
 JOS. C. MORRISON, *J. A.*



A DIGEST  
OF  
ALL THE REPORTED CASES  
DECIDED IN  
THE COURT OF APPEAL,  
FROM THE 15TH SEPTEMBER, 1876, TO THE 27TH JUNE, 1877.

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ADMINISTRATION OF  
JUSTICE ACT.

*Equitable attachment of debt—Gar-  
nishment—Pleading—Equitable de-  
fence at law—A. J. Act, 1873, sec. 3  
—Construction of.]*—The plaintiffs  
had obtained a verdict at law against  
J. D. M., and a rule *nisi* to set aside  
the verdict was pending, when the  
bill in this suit was filed on behalf of  
all the creditors of J. D. M. to im-  
peach a transaction whereby S. M.,  
the wife of J. D. M., was substituted  
for him in a contract in which he  
was interested with one A. M. It  
alleged that J. D. M. was insolvent,  
and that he had induced A. M. to  
admit S. M. as a partner in his stead  
for the purpose of defrauding the  
plaintiffs in the recovery of their  
debt: that A. M. afterwards pur-  
chased J. D. M.'s interest, and agreed  
to pay S. M. \$10,000 therefor, (which  
sum was not due at the commence-  
ment of this suit): that S. M. was  
merely a trustee for her husband in  
respect of this agreement; and the  
bill prayed for an injunction to re-  
strain A. M. from paying the \$10,000  
to either of the defendants, and that

the money might be applied to the  
payment of their debt.

A demurrer for want of equity  
was allowed by PROUDFOOT, V. C.,  
on the ground that the A. J. Act,  
1873, required the plaintiffs to pursue  
the remedy sought by the bill in the  
Court in which the action was pend-  
ing.

On appeal, the judgment below  
was affirmed, on the ground that the  
bill was not sustainable, as the  
moneys could not be attached in  
equity, but

*Held*, also, that the A. J. Act had  
no application: that section 3 of that  
Act is permissive; and that a defen-  
dant may either plead his equitable  
defence at law, or take proceedings  
in equity, but the equitable defence  
must be raised before judgment, for  
a judgment at law once recovered  
against him will be unimpeachable in  
equity.

*Per Moss, J. A.*—Even if the Act  
were compulsory it would not apply,  
for a party would be bound only to  
plead what might be necessary to  
meet his opponent's case; and as to  
collateral matters not in question in  
the action, the jurisdiction of the

Court of Chancery would remain as before.

By an amendment it was stated that subsequently to the filing of the bill the Federal Bank gave notice that they claimed a lien on A. M.'s bond to S. M. to assure payment of the purchase money, as assignee of S. M., but there was no distinct allegation that a bond was given.

*Per* PATTERSON and MOSS, JJ. A.—The defendants could not be required to answer a statement so uncertain and inconclusive. *St. Michael's College v. Merrick et al.*, 520.

*See* APPEAL—INTERPLEADER.

## AMENDMENT.

*See* CHOSE IN ACTION—MORTGAGE.

## APPEAL.

*Right to appeal*—33 Vic. ch. 7, sec. 6—*A. J. Act*, 1873, sec. 44.]—*Held*, that there is no appeal to this Court where a verdict has been pronounced in the Q. B. or C. P., under 33 Vic. ch. 7, sec. 6, reversing the verdict of the Judge at the trial, upon the weight of evidence.

*Held*, also, that sec. 44 of the Administration of Justice Act, 1873, only confers a right of appeal against judgments pronounced under the authority of that Act. *Trumpour v. Saylor*, 100.

*See* LIMITATIONS, STATUTE OF, 1.

## ASSIGNMENT.

*Of Mortgage*]—*See* MORTGAGE.

*Of Chose in Action*]—*See* CHOSE IN ACTION.

## ATTACHMENT OF DEBTS.

*See* ADMINISTRATION OF JUSTICE ACT—INTERPLEADER.

## BASTARD.

*Maintenance of illegitimate child—Action therefor against executors—Consol. Stat. U. C. ch. 77, sec. 4.]—Held*, affirming the judgment of the County Court, that an action will lie against the representatives of a deceased father for the maintenance of his illegitimate child during his lifetime, under Consol. Stat. U. C. ch. 77, sec. 4. *Monohan v. Oke et al., Executors*, 268.

## BILLS AND NOTES.

*See* HUSBAND AND WIFE—INSURANCE, 2—WAREHOUSE RECEIPTS.

## BRIDGES.

*See* WAYS.

## CHOSE IN ACTION.

*Assignment of chose in action*—35 Vic. ch. 12, O.—*Meaning of assignee—Amendment.*]—An assignee, in order to obtain the benefit of 35 Vic. ch. 12, O., must take the beneficial interest in the claim assigned. He cannot sue in his own name where the assignment has been made only in order to enable him to bring the action.

An amendment by adding the name of the assignor as a plaintiff was refused at this stage, as such an amendment could only have been made on payment of all costs, and this would have been of no practical



advantage to the assignor, who could still sue in his own name. *Wood v. McAlpine*, 234.

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## COMMISSION.

*See* INSOLVENCY, 6.

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## COMPOSITION & DISCHARGE.

*See* INSOLVENCY, 1, 4.

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## CONTRACT.

*See* STOPPAGE IN TRANSITU—SALE OF GOODS.

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## CONTRIBUTORY NEGLIGENCE.

*See* MUNICIPAL CORPORATION.

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## COPYRIGHT.

*Copyright*—38 Vic. ch. 88, D.]—*Held*, affirming the judgment of PROUDFOOT, V. C., 23 Grant 590, that it is not necessary for the author of a book, who has duly copyrighted the work in England under 5 & 6 Vic. ch. 45, to copyright it in Canada under the Copyright Act of 1875, with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada.

*Quære*, as to the admissibility, with a view to the construction of a statute, of the language used by the Secretary of the for the Colonies in introducing it in Parliament.—*Smiles v. Belford et al.*, 436.

## CORPORATION.

*Public company under 27 & 28 Vic. ch. 23—Shareholders' liability.*]—Certain shares in a company incorporated by letters patent issued under 27–28 Vic. ch. 23, were allotted by resolution of the directors among themselves at 40 per cent. discount, their then supposed value, and scrip issued for them as fully paid up. G. acquired shares under this arrangement, which he assigned to the defendant for value, representing them as being fully paid up. Defendant enquired of the secretary of the company, who also informed him that they were fully paid up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up on the transfer book and other books, but the true state of the case could have been ascertained by reference to the ledger and journal.

*Held*, reversing the judgment of the Court of Queen's Bench, that defendant was liable to a creditor of the company for the amount unpaid upon the shares.

*Held*, also, that the action of the directors in issuing the shares at less than their nominal value was *ultra vires*. *McIntyre v. McCracken*, 1.

This judgment has since been reversed in the Supreme Court, RICHARDS, C. J., and RITCHIE, J., dissenting.

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## COSTS.

*See* INSOLVENCY, 1—DOWER.

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## DAMAGES.

*See* MERCANTILE AGENCY—MUNICIPAL CORPORATIONS.

## DEBT.

See WAREHOUSE RECEIPTS.

## DEED.

*Deed—Escrow.*—To a declaration on covenant for quiet enjoyment in a mortgage to the plaintiffs, executed by T., the defendants' grantee, one defendant pleaded that T. did not, after the making of that deed, convey to the plaintiffs.

The deed from defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiff was dated 10th April, 1855. Both were registered on the 28th July—the deed first. It appeared that there were two mortgages from T. to the plaintiffs on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August.

*Held*, in the Queen's Bench, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title, and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover.

*Held*, on appeal, reversing the judgment of the Queen's Bench, HAGARTY, C. J., dissenting, that there was no sufficient evidence to shew that the mortgage was not intended to take effect when it was executed on the 10th April, 1855. *The Trust and Loan Company v. Covert et al.*, 26.

This judgment has since been reversed in the Supreme Court.

## DEFAMATION.

*Libel—Privileged communication—Excess.*—The plaintiff had been the agent of the defendants, an insurance company. Having left them, he entered the service of another company, for whom he successfully canvassed among defendant's customers, asking those whose policies were about to expire to insure, not telling them that he was acting for another company. The defendants gave evidence that he asked several of their customers to *renew* their policies, without mentioning that he had ceased to be their agent. The defendants' officers were informed of all this, and that he was representing himself as their agent. Under these circumstances, defendants published in a newspaper this advertisement: "Caution. N.B.—Notwithstanding the false statements of (plaintiff) to the contrary, he is no longer an agent of this company."

*Held*, reversing the judgment of the Queen's Bench, 38 U. C. R. 76, SPRAGGE, C., dissenting, that the publication was not privileged.

*Per* PATTERSON, J. A., that the statement was not protected by privilege, although made under the belief of its truth, if it were, in point of fact, false; and that even if the occasion precluded the implication of malice, the privilege had been exceeded both in the language used and in the publication in a newspaper, so as to afford evidence of malice.

*Per* BLAKE, V. C., that the language would have been privileged if made to any one dealing with the company, but that the privilege had been forfeited by its publication in a newspaper. *Holliday v. The Ontario Farmers' Mutual Ins. Co.*, 483.

## DOWER.

*Dower—Demand—Costs—32 Vic. c. 7, O.*]—The plaintiff filed her bill for dower. The defendant admitted her title, but submitted that her proper remedy was at common law under the Dower Act of Ontario, and claimed the same benefit of that objection as if he had demurred.

*Held*, affirming the judgment of BLAKE, V.C., that the jurisdiction of the Court of Chancery in cases of dower had not been ousted by that statute; and that the defendant was properly made to pay the costs up to and inclusive of the hearing.

*Held*, also, that under the existing law no demand is necessary before suit. *Grieve v. Woodruff*, 617.

## DRAIN.

*See* MUNICIPAL CORPORATIONS.

## ESCROW.

*See* DEED.

## ESTATE.

*See* WILL.

## ESTOPPEL.

*Sale of goods—Representation—Estoppel.*]—The plaintiffs, makers of safes in Toronto, sold a safe to one H., of London, on a written order stipulating that he was to give his notes at four and six months for the price; that his name was to be painted on the front of the safe, and that no title to the safe was to pass to H. until full payment of the price agreed upon. The plaintiff accord-

ingly had H.'s name painted on the safe, and delivered it to him in August, 1876. In November of the same year defendant purchased the safe from H. after having first searched the office of the County Court Clerk for incumbrances against it, and believing it to belong to H.; whereupon the plaintiffs brought trover.

*Held*, reversing the judgment of the County Court, PATTERSON, J. A., dissenting, that the plaintiffs were not estopped from proving their ownership of the safe. *Walker et al. v. Hyman*, 345.

*See* SALE OF GOODS.

## EXECUTION.

*Interpleader issue—Partnership property—Jus tertii.*]—Partnership property cannot be seized under a *fi. fa.* against one partner, so as to interfere with the property or possession of a co-partner.

In an interpleader issue to try whether certain goods were the property of the plaintiff as against the execution creditor at the time of the delivery of the writ to sheriff, it was proved that the goods originally belonged to W., who had mortgaged them to one D. W. afterwards became a partner of the plaintiff, and the goods were part of the partnership stock-in-trade. A *fi. fa.* against W. was subsequently delivered to the sheriff, who made no actual seizure, merely taking a bond from D. for the safety of the goods. D. was not entitled to the possession of the goods so far as appeared, and the mortgage money was not due. The partnership was afterwards dissolved, when the plaintiff purchased W.'s interest in the goods, and the sheriff then seized them under the *fi. fa.*



*Held*, affirming the judgment of the County Court, that the plaintiff was entitled to succeed on shewing that the goods were partnership property at the time of the delivery of the writ to the sheriff.

*Held*, also, that the plaintiff's right could not be defeated by proving title in the mortgagee. *Ovens v. Bull*, 62.

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### EXECUTORS.

*See* BASTARD.

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### FRAUD.

*See* INSOLVENCY, 3.

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### FRAUDULENT PREFERENCE.

*See* INSOLVENCY, 2, 3, 4.

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### GUARANTEE.

*See* MERCANTILE AGENCY.

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### HIGHWAYS.

*See* WAYS.

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### HIGH SCHOOL.

*See* PUBLIC SCHOOLS.

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### HUSBAND AND WIFE.

*Married Woman—Separate estate*—35 Vic. ch. 16, sec. 9.]—Declaration, on a promissory note made by the defendant, not stating that she was *feme covert*, payable to R. or order, and endorsed by R. to the plaintiffs.

Third plea, that at the time of making the note the defendant was the wife of Thomas Rice.

Replication, that the note was and is the separate engagement and contract of the defendant; on which issue was joined.

*Held*, that the plaintiffs could not recover upon the proof of the note only, without shewing that it was made in respect of some employment or business in which she was engaged in her own behalf, or that she was possessed of separate estate.

*Quære*, per DRAPER, C. J. A., whether they could recover in any event, the note having been made merely for the accommodation of the defendant's son, and apparently without consideration.

*Quære*, also, whether the replication could be looked upon as a short form importing an allegation of all the alternative conditions mentioned in the statute to enable the defendant to contract.

Per BURTON, J. A., an accommodation note is not a contract which a married woman is authorized to enter into under the Act.

Per PATTERSON, J. A., the replication was not in the proper form. It should have set out the facts relied on to make the contract binding; and the defendant instead of taking issue, should have demurred or moved against it. *Darling et al. v. Rice*, 43.

*See* INSOLVENCY, 5.

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### ILLEGITIMATE CHILD.

*See* BASTARD.

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### INDEMNITY.

*See* WAREHOUSE RECEIPTS.



## INSOLVENCY.

1. *Insolvent Act, 1875—Deed of composition and discharge—Joint and separate creditors—Sale en bloc.*]

The insolvents, who were partners, made an assignment expressed to be in pursuance of the Insolvent Act, but attempted to limit its operation by inserting after the general description of property in the statutory form the words "of and belonging to the said co-partnership." Each of the partners had separate estate, and separate creditors. The assignee, acting under advice, only took possession of the partnership estate. Shortly afterwards James McLaren, a brother of one of the insolvents, offered to purchase the partnership estate, and upon sufficient in number and value of the joint creditors signing a deed of composition and discharge, the assignee transferred the estate to him, without any authority from the creditors, and without calling any meeting under section 49, to take the deed into consideration. At a subsequent meeting of the joint creditors, resolutions were passed approving of the deed, of the sale to McLaren, and of the action of the assignee. The dissentient joint creditors petitioned the County Judge to order the assignee to take possession of the separate estates, and to account for any loss occasioned by his omission to take possession of them, and for the value of the estate transferred to McLaren.

The learned Judge ordered the assignee to take possession of the separate estates, but did not deal with the other subjects of the petition. From this order the petitioners appealed.

*Held*, that the deed was void as to the appellants; and that it could not be supported under section 38, being

a sale *en bloc* within the meaning of the proviso prohibiting such a sale without the previous sanction of the creditors.

*Held*, also, that the assignee was liable to account for any loss the dissentient joint creditors might sustain in consequence of such sale.

The appellants were allowed their costs of appeal; and the assignee's costs, in view of all the facts, were allowed out of the estate. *Re McLaren and Chalmers*, 68.

2. *Insolvency—Fraudulent preference—Fresh advance—Insolvent Act of 1875.*]

An assignment of the whole of a debtor's estate to secure a pre-existing debt is valid where a further advance is made, and there is a *bonâ fide* expectation and intention that the business of the debtor will be carried on.

The insolvent gave one of his creditors a chattel mortgage upon the whole of his stock then in, or which at any time during its continuance might be in his store, for an existing debt and a fresh advance; but the evidence set out below shewed that the advance was not made with the *bonâ fide* belief and intention that the business would be carried on through the relief afforded.

*Held*, that the mortgage was fraudulent, and could not be supported even for the further advance. *Kalus v. Hergert*, 75.

3. *Insolvent Act of 1875—Claim for rent.*]

Under the Insolvent Act of 1875, secs. 74–125, the assignee is bound to recognize the claim of the landlord, although he may not have distrained, as a "preferential lien" with respect to the goods on the demised premises, for whatever rent became due during the year before the assignment or attachment. The

lease, dated 15th December, 1875, for ten years, made the first year's rent payable in advance, and contained a proviso that in the event of insolvency "the term shall immediately become forfeited and void, but the next *succeeding current year's* rent shall, nevertheless, be at once due and payable." The assignment in insolvency took place on the 22nd September, 1876.

*Held*, that the landlord was entitled to the first year's rent, as a preferred claim, but that the proviso was void as being a fraud on the Insolvent Act, and that he therefore could not prove for the second year. *In re Hoskins and Hawkey, Insolvents*, 37 J.

4. *Insolvent Act of 1875—Composition and discharge—Fraudulent preference.*]—Where, under the Insolvent Act of 1875, G. & M., creditors of the insolvent, signed a deed of composition and discharge upon the assignee's giving them his note to cover certain law costs which they had incurred in endeavouring to recover the claim, and there was not a sufficient number in value of creditors signing without G. & M.

*Held*, affirming the judgment of the County Court, that the deed was invalid, even though the act of the assignee was unauthorized by the insolvent. *In re McRae, Insolvent*, 387.

5. *Insolvency—Loan by wife to husband—Proof.*]—A married woman, married in 1869, transferred certain shares, which formed part of her separate estate, to her husband, the insolvent, in 1871, for the purpose of being used in his business, upon a promise of repayment by him.

*Held*, reversing the decision of the County Court, that she was entitled to prove as a creditor.

Clear and convincing evidence of the *bona fides* of such a claim, and of the actual creation of the debt at the time of the alleged loan, should be given before admitting it to proof.—*Re Miller, an Insolvent*, 393.

6. *Insolvent Act of 1875—Remuneration of Assignee.*]—An offer by a creditor to purchase the estate at 20 cents in the \$, exclusive of the claim of the Bank of Toronto, was accepted. The bank was fully secured by the purchaser's endorsement.

*Held*, affirming the decision of the County Court, that the assignee was not entitled to a commission on the bank's claim.—*Re Smith & Co., Insolvents*, 480.

## INSURANCE.

1. *Notice of additional insurance—Dissent by company—36 Vic. ch. 44, secs. 37, 38, O., Construction of.*]—R., who had insured on the 20th April, 1875, in defendants' company, on the 1st July effected an additional insurance in the Stadacona Company and on the 5th July posted a notice to the defendants' local agent informing him of the fact. The notice also notified the defendants of his intention to effect an additional insurance in the Beaver and Toronto Mutual Insurance Company; and on the 16th July, and without any further notice, he effected such insurance. The agent received the notice on the 5th, and on the 8th forwarded it to the head office, where it was received on the 10th. The premises were destroyed by fire on the 19th, and on the 20th, after notice of the loss, the defendants notified the insured that they would not consent to the additional insurance, and that they had cancelled their policy.

*Held*, affirming the judgment of the Common Pleas, that the notice was within the two weeks allowed to the company to dissent from an additional insurance under 36 Vic. ch. 44, sec. 38, O., and that the policy was avoided.

*Per* PATTERSON, J. A. The insurance effected in the Beaver and Toronto Mutual Insurance Company, in pursuance of the notice of intention to insure, would not have avoided the policy if the company had not dissented therefrom within the fourteen days.

*Per* HARRISON, C. J., secs. 37 and 38 should be read together, and the words "the policy of the assured shall be void at the option of the directors of the company," in section 38, modify the word "void" in section 37, so as to make it "voidable at the option of the directors of the company," *Semble*, that the notice must be received by the company, and not by their local agent.—*McCrea v. The Waterloo County Mutual Fire Insurance Co.*, 217.

2. *Premium notes—Mut. Ins. Co.*] *Held*, reversing the judgment of the County Court, that a promissory note made in 1871, payable to the order of a Mutual Insurance Company, or its officers, in respect of a policy, was negotiable.—*Gore District Mutual Ins. Co. v. Simons*, 13 U. C. R. 556, commented upon. *McArthur v. Smith et al.*, 276.

3. *Misstatement as to incumbrances Divisibility.*]—The plaintiffs effected an insurance in the defendants' company on a manufactory and the stock contained therein. Their application was for an insurance of \$1,000 on the building, and \$2,000 on the stock, at 5 per cent. on each sum; and it stated that there were no

incumbrances on the property, although there were several mortgages on the building. The risk was accepted at 6½ per cent., and a policy covering both risks was issued by the company, which acknowledged the payment of a premium of \$195.

The policy was made subject to 36 Vic. ch. 44, O. The proviso (since repealed by 39 Vic. ch. 7) to sec. 36 declared, "That the concealment of any incumbrances on the insured property, or on the land on which it may be situate, \* \* shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the Board of directors shall see fit in their discretion to waive the defect."

*Held*, reversing the judgment of the Court of Common Pleas, 26 C. P. 405, HARRISON, C. J., dissenting, that the policy was divisible, the contract of insurance being distinct and separate as to each risk, and therefore that the plaintiffs were entitled to recover the insurance on the stock although the policy was void as to the building.

The judgment was affirmed as to the insurance on the building being void.

There was a covenant in the application, which formed part of the policy, that it contained a full and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, material to the risk and material to be known to the company. *Per* PATTERSON, J. A., the failure to disclose the incumbrances was not a breach of this covenant.

One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk.

*Semble*, *per* PATTERSON, J. A.,



that the omission to state the incumbrances was not necessarily the omission of any fact material to the risk. *Samo et al. v. The Gore Mutual Fire Insurance Co.*, 545.

This case has been carried to the Supreme Court, and stands for judgment.

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## INTEREST.

*See* LIMITATIONS—STATUTE OF, 2.

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## INTERPLEADER.

*Garnishment — Equitable defence — A. J. Act, 1873.*]—In certain garnishee proceedings in the Division Court of the County of Wentworth several creditors had obtained orders attaching the whole amount, \$582, found due under an award from the company to the judgment debtor for a loss by fire, and ordering payment thereof. Subsequently the Judge of the County Court of Essex, notwithstanding the opposition of the company, made a similar order to pay \$208 to another creditor, on the ground that when the summonses in the Division Court of the County of Wentworth were issued there was no attachable debt due. The company unsuccessfully applied to the Judge of the County of Wentworth to rescind his orders, and then filed a bill calling on the defendants, the different attaching creditors, to interplead.

*Held*, SPRAGGE, C., dissenting, affirming the judgment of PROUDFOOT, V. C., 23 Gr. 568, that it was not a proper case for interpleader.

*Per* BURTON and MOSS, JJ. A., that the bill was not sustainable, for the attaching creditors in Wentworth had obtained judgments in the Divi-

sion Court against the plaintiffs, with which the Court of Chancery could not interfere.

*Per* BURTON and PATTERSON, JJ. A., that under the circumstances the Judge of the County Court of Essex had no power to make a summary order for payment.

*Per* PATTERSON, J. A. The rights of all parties might be adjusted in the suit in the County Court of Essex, and if dissatisfied with the decision there, the plaintiffs might appeal from it.

*Per* PATTERSON, J. A. *Semble*, that the power to bring other parties before the Court under section 8 of the A. J. Act, 1873, does not apply to summary proceedings collateral to the action.

Remarks as to the effect of the A. J. Act, 1873.—*Victoria Mutual Fire Insurance Co. v. Bethune et al.*, 398.

*See* EXECUTION.

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## JUDGMENT.

*See* ESTOPPEL, 2.

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## JUS TERTII.

*See* EXECUTION.

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## LIBEL.

*See* DEFAMATION.

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## LIEN.

*See* MECHANICS' LIEN ACTS.



## LIMITATIONS, STATUTE OF.

*Ejectment—Statute of Limitations—Acceptance of deed by person in possession.*—About the year 1830 one James Gray took possession of lot 13 in the first concession of East Hawkesbury, and resided on the west half, three of his sons, John, Andrew, and Adam, living and working with him, until about 1847–8, when Adam under the expectation that the land would be his, entered into possession of the east half, with the permission of his father, who subsequently, in 1848, devised it to him by will, and afterwards spoke of him as owner; and although the father up to the time of his death, in 1857, assisted Adam in working this piece, the possession appeared to be exclusively Adam's, who was assessed as owner and paid the taxes, &c. After the father's death, Adam and those claiming under him continued the possession until the commencement of this suit. In 1857 the father made a second will, devising this east half to his son John with an executory devise over, on failure of issue, to his son Thomas. In 1862 while Adam was so in possession, he obtained a conveyance with full covenants for title from John. In 1874 John died unmarried, and without lawful issue; and on the 5th May, 1875, Thomas brought ejectment against defendants claiming under Adam; but neither at the trial nor in term was any question raised as to the effect of John's deed.

*Held*, in the Court of C. P., that the plaintiff could not recover, for without considering the effect of John's deed, there was sufficient evidence of possession in the defendants to give them the title under the Statute of Limitations, the possession of Adam having been under the

evidence an exclusive possession as owner.

On appeal, the effect of John's deed having been argued and considered:

*Held*, per PATTERSON and MOSS, J.J. A., that its effect was to stop the running of the statute, and create a fresh statutory point, for after the deed, Adam's possession became rightful, so the defendants had not acquired the title by possession as against Thomas; and that therefore the judgment should be reversed.

Per BURTON, J.A., and HARRISON, C.J., that no such effect should be given to the deed: that defendants had acquired the title under the statute; and that the judgment should be affirmed.

Per HARRISON, C. J., that the question not having been raised in the Court below should not be given effect to in appeal.

Per MOSS, J. A., the Court should not refuse to entertain the point, for it was not one which could be affected by further evidence.—*Gray v. Richmond et al.*, 112.

This case has been carried to the Supreme Court, and stands for judgment.

2. *Statute of Limitations—Part payment.*—The plaintiff, an attorney, had an account for costs against the defendant, a merchant, for services rendered before 1870, and which was therefore barred by statute. It appeared that in 1872 the plaintiff bought certain goods from the defendant, without any agreement at the time as to how they were to be paid for, but after the defendant had rendered his account for them, the plaintiff told him or his clerk that he had credited it against his, the plaintiff's account, and no subsequent demand was made upon

him for payment. In 1875 the plaintiff sent the defendant his account, and stated that he had credited defendant's account rendered. The defendant's clerk answered, repudiating the claim, and added "Trusting that you may be able to make your account out of the parties against whom you got judgment in the case, as well as the advances made by me in cash, and the supplies charged to you since in my books."

*Held*, affirming the judgment of the Queen's Bench, 39 U. C. R. 488. BURTON, J.A., dissenting, that upon the above facts, and upon the evidence more fully stated below, there was no evidence of the defendant's assent to the application of the price of the goods as a payment on the plaintiff's account sufficient to take the case out of the statute.—*Ball v. Parker*, 593.

3. *Mortgage suits — Statute of Limitations.*—*Held*, reversing the decision of Proudfoot, V. C., 24 Gr. 457, that it is unnecessary to plead the Statute of Limitations in mortgage suits to prevent the recovery of more than six years' arrears of interest in taking the accounts before the Master, as the filing a disputing note is sufficient.—*Wright v. Morgan*, 613

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## MARRIED WOMEN.

See HUSBAND AND WIFE.

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## MECHANICS' LIEN ACTS.

*Mechanics' Lien Acts of 1873 and 1874.*—The plaintiffs registered a lien under the "Mechanics' Lien Act of 1873" on the 14th of August 1874, for the price of machinery furnished on the 12th of the same

month. The price was payable in instalments, the last of which fell due on the 4th of May, 1875. A bill to enforce the lien was filed on the 7th of July, 1875, being within the 90 days "from the expiry of the period of credit" prescribed by section 4 of the "Mechanics Lien Act of 1873."

The 14th section of the "Mechanics' Lien Act of 1874," which came into force on the 21st of December, 1875, enacted that "Every lien shall absolutely cease to exist at the expiration of 30 days after the work shall have been completed, or the machinery furnished, unless in the meantime proceedings shall have been taken to realize the claim under this Act"; and section 20 repealed all Acts inconsistent therewith.

*Held*, PROUDFOOT, V. C., dissenting, reversing the decree of BLAKE, V. C., 24 Gr. 209, that even if the Act of 1874 repealed the Act of 1873, the plaintiffs' lien was saved by sub-section 34 of section 7 of the Interpretation Act, which provides that the "repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued, or established \*

\* before the time when such repeal shall take effect.—*Walker et al. v. Walton et al.*, 579.

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## MERCANTILE AGENCY.

*Representation as to credit—Action for*—C. S. U. C. ch. 44, sec. 10—*Measure of damages.*—The defendants, who carried on the business of a trade protection society, in consideration of a yearly subscription, undertook to procure and furnish the plaintiff, a merchant in Toronto, to the best of their ability, with information of the mercantile standing

and credit of the plaintiff's customers among the merchants, traders and manufacturers throughout the United States and Canada (in the communities wherein they respectively resided for the purpose of aiding the plaintiff in determining the propriety of giving credit. On the 10th June, 1875, the plaintiff sent his clerk to the defendants to ascertain the mercantile standing and credit of one W., residing and doing business in Toronto, who had applied to him to purchase goods on credit. The defendants' clerk read out of a book to the plaintiff's clerk—that W. had stock about \$10,000, and \$5,000 or \$6,000 in his business, and claimed to be worth \$7,000: that his character and habits were good: that he was doing a fair trade: and that his credit was good locally. The plaintiff, relying on this report, which had reference (to the knowledge of the plaintiff) to the information which the defendants had collected on the 29th April previously, and without making any further enquiries sold to W., about twelve days afterwards \$500 worth of goods on credit. W. was really insolvent at the time that the report was made, and on the 8th July following absconded without paying the plaintiff.

The jury found that the defendants did not furnish the information to the best of their ability, and that the plaintiff did not act imprudently in not making further enquiries.

*Held*, reversing the judgment of the Queen's Bench, HAGARTY, C. J. C. P., dissenting—that the defendants were not liable for the loss which the plaintiff had sustained, for that the action was brought upon or by reason of the representation, which was not in writing and signed by them under C. S. U. C. ch. 44, sec. 10, and was therefore not receiv-

able in evidence; and the fact that the representation was made in pursuance of a contract did not prevent the application of the statute.

*Held*, also, that under the circumstances the plaintiff was only entitled to nominal damages for the breach of the contract to procure and furnish the information.—*McLean v. Dunn et al.*, 153.

## MORTGAGE.

*Mortgagor and mortgagee—Assignment—Notice—Payments on mortgage—Registration.*—B. being the owner of lot A, mortgaged the same to C., who assigned the security to J., covenanting for the payment of the mortgage money, which assignment was duly registered. Afterwards B. agreed with W., the owner of lot B, to exchange properties, B. undertaking to have his mortgage to C. transferred from lot A to lot B, to which C. assented, not informing either of them of the assignment. C., who was a solicitor, was employed by both parties to prepare the several conveyances, including the mortgage from B. to himself on the newly acquired property. No mention was made or production demanded of the first mortgage, which remained undischarged. B. paid off and obtained from C. a discharge of the new mortgage given by him on lot B; and C. paid the interest to J. for several years, when he made default, and the plaintiffs, the representatives of J., then applied to B., when he, for the first time, was made aware of the assignment.

*Held*, reversing the decision of the Chancellor, that the payments so made by B. to C. had not the effect of discharging the mortgage on lot



A, and that the plaintiffs were entitled to a foreclosure.

*Held*, also, that W. was affected with notice of the assignment by reason of the registration; and with constructive notice, by his omission to make any enquiries for the mortgage.

*Held*, also, that it was not necessary to set up the registration of the assignment in the bill in order to prove notice; and that, if necessary, an amendment should have been allowed under the A. J. Act, 1873, sec. 50.—*Gilleland et al. v. Wadsworth et al.*, 82

See EXECUTION—LIMITATION—STATUTE OF, 3.

## MUNICIPAL CORPORATIONS.

*Drains—Injury by overflow—Liability of corporation—Contributory negligence.*—The plaintiff was lessee of premises which were drained by a sewer made by the landlord in the street, with the assent of the corporation, who paid half the costs of constructing it. The corporation used it with the landlord's consent as part of the drainage system of the city, and connected it with two large drains of more than double its capacity. In consequence of the accidental bursting of a water pipe near it, a greater quantity of water was discharged into it than it could carry off, and the plaintiff's cellar was flooded and his goods damaged.

*Held*, on appeal, affirming the judgment of the County Court, that the defendants were guilty of negligence; and that the plaintiff's contributory negligence in not using sufficient exertions to save his goods, could at

most only affect the quantum of damages.—*Coghlan v. The Corporation of the City of Ottawa*, 54.

See PUBLIC SCHOOLS—WAYS.

## NEGLIGENCE.

See MUNICIPAL CORPORATIONS.

## NOTICE.

See MORTGAGE.

## PARTNERSHIP.

*Partnership—What constitutes—Sharing the profits.*—Randolph and brother were lumber merchants at Stayner. Peckham & Hoag, of Toronto, received consignments of lumber from them for sale, and accepted their drafts drawn against such consignments. P. & H. were paid by commission until 1872, when the Randolphs dissolved. It was then agreed that the business should be carried on by George Randolph; that P. & H. should receive one-half the net profits of the business, to be credited to them upon a statement and settlement of mutual accounts each year, instead of a commission as formerly, and should guarantee all sales made by them; and that the amount then due to P. & H. should be carried to the debit of George. No provision was made in respect of losses, but by a special agreement when Randolph's mill and a large quantity of lumber were destroyed by fire in 1873, P. & H. shared half of the loss, partly, as they said, to save him from ruin, which would have destroyed all prospects of their getting paid what he owed them,



and partly because they were to blame for not seeing that he was insured. P. & H. had access to Randolph's books, and the yearly balancing was done under their supervision. One purchase of timber land was made in the joint names of Randolph and a member of the firm of P. & H., which was said to have been by way of security to them, but it was paid for by Randolph alone.

George Randolph having become insolvent, P. & H. claimed as his creditors for the balance due them, but their claim was resisted on the ground that they were partners with the insolvent. It appeared from the evidence that no partnership was ever intended by the parties, and that they had never held themselves out as partners.

*Held*, reversing the judgment of the County Court, that no partnership existed.—*In Re George Randolph, an Insolvent*, 315.

See EXECUTION.

## PAYMENT.

See MORTGAGE—LIMITATIONS—  
STATUTE OF, 2.

## PERPETUITIES.

See WILL.

## PLEADING.

See ADMINISTRATION OF JUSTICE ACT.

## PLEADING IN EQUITY.

See ADMINISTRATION OF JUSTICE  
ACT—LIMITATIONS—STATUTE OF, 3  
—MORTGAGE.

## POWER OF ATTORNEY.

See TRUST AND TRUSTEES.

## PRACTICE IN APPEAL.

See LIMITATIONS—STATUTE OF.

## PRINCIPAL AND AGENT.

See TRUST AND TRUSTEES.

## PRINCIPAL AND SURETY.

See WAREHOUSE RECEIPTS.

## PRIVILEGED COMMUNICATION.

See DEFAMATION.

## PUBLIC SCHOOLS.

*High School—37 Vic. ch. 27, O.]*  
—*Held*, affirming the judgment of the Queen's Bench, that under 37 Vic. c. 27, O., the High School Board for a district composed of two municipalities, a town and a township, can compel one of the municipalities, the township, to contribute towards the erection of a school-house in the other municipality, and not merely towards its maintenance. —*In the Matter of the Niagara High School Board and the Corporation of the Township of Niagara*, 288.

## REGISTRATION.

See MORTGAGE.

## RENT.

See INSOLVENCY, 3.

## REPRESENTATION.

*As to Credit.*—See MERCANTILE AGENCY.

## RIVER.

See WAYS.

## RULES OF COURT.

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## SALE OF GOODS.

1. *Sale of tea—Dispute as to weight—Construction of contract.*—The plaintiffs, carrying on business at Hamilton, sold a certain number of chests of tea, through a broker at Toronto, to the defendants, who were merchants at the latter place. Before shipping the goods, the plaintiffs ascertained the net weight of the tea, after deducting the weight of the chests, by a mode in general use in the trade, and sent an invoice charging defendants with the number of pounds so ascertained. Some days after the receipt of the goods the defendants wrote to the plaintiffs refusing to remit their notes for the amount charged, on the ground that the taring was incorrect, and added, "If you wish, we will have more of them tared, or you can send down yourselves, when I will settle." One of the plaintiffs thereupon came down to Toronto, and the goods were re-tared at defendants' warehouse in the presence of the broker and the defendants' agent, when it was ascertained that the defendants were chargeable with 95 lbs. more than the plaintiffs had claimed. The defendants then sent their notes for the

amount charged in the original invoice, and refused to pay for the additional 95 lbs.

*Held*, reversing the judgment of the County Court, that the defendants had bound themselves by their letter and conduct to abide by the result of the re-taring at Toronto, and were liable for the additional weight so ascertained.—*Brown et al. v. Shaw et al.*, 293,

2. *Judgment—Estoppel—Pleading.*—In an action upon the common counts for the price of certain timber, delivered under a contract, the defendants objected to the non-joinder of J. B., the plaintiff's brother, as a plaintiff, and attempted to prove that they contracted with them both, as "Brown Bros.," by an exemplification of a judgment recovered by the defendants after issue joined in this suit, but not pleaded herein, in an action against the plaintiff and his brother for the non-delivery of part of the timber in question. To that action the plaintiff pleaded that he never was a member of the firm of "Brown Bros.," and both the defendants therein (the plaintiff and his brother) pleaded a denial of delivery of part of the timber by them as alleged, and a denial of the contract. The jury found all the issues in favour of the plaintiffs.

*Held*, affirming the judgment of the County Court, that the judgment was not conclusive, as it had not been pleaded by way of estoppel *puis darrein continuance*, as it might have been.

*Held*, also, that if pleaded it would not necessarily have been conclusive, for it shewed only that the two brothers were jointly liable upon this contract, and the plaintiff might have been so liable as a member of the firm by holding himself out as such.

The evidence set out below tended to shew the plaintiff alone entitled to recover, and the Court, on appeal from the County Court, refused to interfere with a verdict in his favour. — *Brown v. Yates et al.*, 367.

See ESTOPPEL—STOPPAGE IN TRANSITU.

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## SALE OF LANDS.

See TRUST AND TRUSTEES.

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## SCHOOLS.

See PUBLIC SCHOOLS.

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## SEPARATE ESTATE.

See HUSBAND AND WIFE, 1.

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## SHAREHOLDER.

*Liability to creditors.*]—See CORPORATION.

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## STATUTES — CONSTRUCTION OF.

See MECHANICS' LIEN ACTS.

A. J. Act, 1873, sec. 8.]—See INTERPLEADER.

A. J. Act, 1873, sec. 3.]—See A. J. ACT.

A. J. Act, 1873, sec. 44.]—See APPEAL.

Municipal Act of 1873, secs. 413, 416.]—See WAYS.

24 Vic. ch. 23.]—See WAREHOUSE RECEIPTS.

27-28 Vic. ch. 23.]—See CORPORATION.

32 Vic. ch. 7, O.]—See DOWER

33 Vic. ch. 7, sec. 6.]—See APPEAL.

35 Vic. ch. 12, O.]—See CHOSE IN ACTION.

35 Vic. ch. 16, sec. 9.]—See HUSBAND AND WIFE.

36 Vic. ch. 44, secs. 37, 38, O.]—See INSURANCE.

37 Vic. ch. 27, O.]—See PUBLIC SCHOOLS.

38 Vic. ch. 88, D.]—See COPYRIGHT.

Con. Stat. U. C., ch. 77, sec. 4.]—See BASTARD.

Con. Stat. U. C., ch. 44, sec. 10.]—See MERCANTILE AGENCY.

Con. Stat. U. C., ch. 54, Sec. 8.]—See WAREHOUSE RECEIPTS.

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## SOLICITOR.

*Dealing with client.*]—See TRUSTS AND TRUSTEES.

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## STOCK.

See CORPORATION.

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## STOPPAGE IN TRANSITU.

*Goods in bond.*]—The plaintiffs, merchants in New York, sold to E. B. & Co. at Toronto, 250 barrels of currants on credit, and consigned the same to them in bond. A bill of lading thereof was duly received by E. B. & Co., who paid the freight thereon, and gave their acceptances for the price of the said goods, as well as for the cartage and American bonding charges. The goods, on arrival, were entered and bonded in the consignee's name, and placed in one of the customs bonded warehouse subject to the payment of the duties. E. B. & Co. sold and delivered 150 barrels, and the remaining 100 barrels were bonded under 31 Vic. ch. 6, D. in a portion of E. B. & Co.'s warehouse partitioned off and used by the customs authorities. Before the acceptances matured, and while the

goods remained in bond, E. B. & Co. became insolvent.

*Held*, reversing the judgment of the Queen's Bench, that the *transitus* was at an end, and that the plaintiffs had lost the right to stop the goods. — *Wiley et al. v. Smith*, 179.

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## TEA.

*See* SALE OF GOODS.

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## TRUST AND TRUSTEES.

*Principal and agent—Trustee and cestui que trust.*]—In 1847 the plaintiff, being about to leave Canada, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, George Taylor, one of the above named defendants. Only a small portion of the purchase money had been paid, the rest having been long in default, and no provision was made by the plaintiff for the payment of the balance. In April, 1851, the brother re-assigned the land to the plaintiff, without any consideration, and without his knowledge, for the purpose either of being enabled to deny his title to the land with a view to a suit brought by one Cannif, who was in possession of the land claiming adversely; or to prevent the bringing of *qui tam* action for buying a title which was in litigation. The brother paid the residue of the purchase money without the plaintiff's aid or knowledge, and a deed of the land issued in the plaintiff's name. Afterwards, in October, 1851, the plaintiff executed a power of attorney enabling the brother to *sell* the land in question, mentioning it specifically, and a gen-

eral power to *sell or lease* any lands which he owned in Canada. In 1856 the brother conveyed the property to W. for the alleged consideration of \$1000, and W. immediately re-conveyed one-half of the land to the brother for the alleged consideration of \$200. The plaintiff returned to Canada in 1873, and filed a bill impeaching the transaction between his brother and W., and seeking to have them declared trustees for him. At the hearing the plaintiff and his brother compromised their difficulties.

*Held*, affirming the judgment of the Court of Chancery, HAGARTY, C. J. C. P., dissenting, that the defendant George Taylor was the beneficial owner of the land at the time of the conveyance to W.; and the Court refused to set aside such conveyance.—*Taylor v. Taylor et al.*, 245.

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## ULTRA VIRES.

*See* CORPORATION.

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## WAREHOUSE RECEIPTS.

*Warehouse receipts—What constitutes a debt—C. S. C. ch. 54, and 24 Vic. ch. 23.*]—The plaintiff accepted two accommodation bills for one C. on the 29th June, 1874, and C. procured a warehouse receipt for coal from the defendants, dated on the same day, which he endorsed to the plaintiff by way of security. In an action on this receipt for non-delivery of the coal.

*Held*, reversing the judgment of the Common Pleas, 27 C. P. 34, which followed *Re Coleman*, 36 U. C. R. 559, that the plaintiff could



not recover, for there was no debt contracted from C. to the plaintiff at the time of the endorsement of the receipt within the meaning of C. S. C. ch. 54, sec. 8, and 24 Vic. ch. 23, the liability incurred by C. to indemnify the plaintiff against these acceptances not constituting a debt until default made by C.

*Macnee v. Gorst*, L. R. 4 Eq. 315, 15 W. R. 1198, distinguished.—*Cockburn v. Sylvester et al.*, 471.

### WATER.

See MUNICIPAL CORPORATIONS.

### WAYS.

*Road between townships—Bridge—“River”—Duty to repair—Municipal Act of 1873, secs. 413, 416.*—A stream, called Black Creek, from 30 to 40 feet in width, with clearly defined banks, crosses the road forming the boundary line between the townships of Ellice and Downie, and is crossed by a bridge on that road. The plaintiff sustained injuries through the approach to this bridge being out of repair, and sued the township therefor.

Sec. 413 of the Municipal Act enacts that it shall be the duty of county councils to maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and sec. 416 provides that in case a road lies wholly or partly between adjoining townships, &c., the councils of the municipalities between which it lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road.

*Held*, reversing the judgment of

the Queen's Bench, 37 U. C. R. 580, that the Black Creek was a river, within the meaning of sec. 413; and that the county council therefore, and not the defendants, was liable.—*George McHardy v. The Corporation of the Township of Ellice and the Corporation of the Township of Downie*, 628.

### WEIGHT.

See SALE OF GOODS.

### WILL.

*Will—Construction—Estate tail—Perpetuity—Restraint on alienation.* ]  
—A testator, who died in 1849, devised as follows: “It pleased the Lord to give me two sons, equally dear to my heart. To give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line. To him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground, and the quarter of an acre for a place of worship.” (To Duncan, his son, he gave his family Bible and 5s., above what he had done for him.) “To Peter Ferguson, my son, I bequeath my implements belonging to my farm and to occupy the farm, and to answer State dues and publick bindings himself, and the lawful male offspring of his body, until the proper heir are come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber, of whatsoever kind, away off the land, or bringing any other family on to it but his own. But if he leave a situation so advantageous \* \* I

appoint Peter McVicar, my grandson, to take charge of the place, farm, and all that pertains to it, and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age, as aforesaid."

The testator died in 1849, leaving the land subject to a lease, which expired in 1857. Peter Ferguson, after having gone into occupation in that year conveyed his interest to Peter McVicar, named in the will, and left the place in the same year. Neither of the testator's sons had any son born during the testator's lifetime. The plaintiff in ejectment, the heir-at-law of Peter Ferguson, the son, claimed that under the will his father took an estate tail, which descended to him. The defendant was the heir-at-law of the testator, and had also a conveyance from Peter McVicar.

*Held*, reversing the judgment of

the Queen's Bench, 39 U. C. R. 232, that Peter Ferguson took an estate tail male, with an executory devise over to the first great grandson descending from one of testator's sons in the masculine line: that the condition as to occupation, &c., if it imposed the duty of personal occupation was void, as being repugnant to that estate: that such estate being destructable by barring the entail, was not an infringement of the law against perpetuities; and that the plaintiff therefore was entitled to recover.—*Donald McGregor Ferguson, an Infant, by Allan Grant, his Guardian. v. The Rev. John Ferguson*, 452.

This case has been carried to the Supreme Court, and stands for judgment.

#### WORDS, CONSTRUCTION OF.

"*River.*"]—*See* WAYS.

















